No.

October Term, 2018

In the
Supreme Court of the United States

Bruce Mayo Ennis,
Petitioner,
v.
Brian E. Williams, Sr. Warden,
Respondent.

On Petition for Writ of Certiorari to the
Nevada Supreme Court

Petition for Writ of Certiorari

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QUESTION PRESENTED

In 2001, this Court left open the question of whether due process requires the states to retroactively apply a decision narrowing the interpretation of a substantive criminal statute. *Fiore v. White*, 531 U.S. 225, 228 (2001). A deep and intractable split then emerged in the state courts, with a majority granting full retroactivity while a small number imposing a retroactivity bar.

In 2016, this Court issued two opinions that resolve this split. In *Montgomery v. Louisiana*, 136 S. Ct. 718, 727-29, 731-32 (2016), this Court constitutionalized the "substantive rule" exception to *Teague*. "A rule is substantive [and, hence, retroactive] if it alters the range of conduct . . . that the law punishes." *Schriro v. Summerlin*, 542 U.S. 348, 353 (2004). In *Welch v. United States*, 136 S. Ct. 1257, 1267 (2016), this Court made clear the "substantive rule" exception includes decisions narrowing the interpretation of a substantive criminal statute. This new constitutional rule sets the constitutional floor for how the "substantive rule" exception must be applied in the state courts. Those states that do not allow for full retroactivity are wrong.

This includes Nevada. After Branham's first-degree murder conviction became final, the Nevada Supreme Court narrowed the definition of the first-degree murder statute. However, even in light of *Montgomery* and *Welch*, Nevada continues to hold that a narrowing statutory interpretation has no retroactive effect. *See Branham v. State*, 434 P.3d 313, 316-17 (Nev. Ct. App. 2018). To ensure uniformity and to correct Nevada's clear error, this Court should grant certiorari on the following question:

1. Under the new constitutional rule of retroactivity established in *Montgomery v. Louisiana* and clarified in *Welch v. United States*, is a state court required under the federal constitution to retroactively apply interpretations of a substantive criminal statute that narrow its scope?

LIST OF PARTIES

The only parties to this proceeding are those listed in the caption.

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Petitioner Bruce Mayo Ennis requests this Court grant his petition for writ of certiorari to review the order of the Nevada Supreme Court. *See* Appendix 001.

OPINIONS BELOW

The order of the Nevada Supreme Court, affirming the denial of Ennis' second state post-conviction petition for writ of habeas corpus is unreported and appears at App. 001-004. The Nevada Supreme Court's 1997 order affirming the judgment of conviction is unreported. App. 100-103.

JURISDICTION

The Nevada Supreme Court's order of affirmance was issued on January 17, 2019. App. 001. On April 5, 2019, Justice Kagan extended the time to file a petition for writ of certiorari until and including May 30, 2019. This Court has statutory jurisdiction under 28 U.S.C. § 1257(a). This petition presents a federal constitutional question for this Court's review as the Nevada Supreme Court's decision did not invoke any state-law grounds "independent of the merits" of Ennis' federal constitutional challenge. *See Rippo v. Baker*, 137 S. Ct. 905, 907 n.1 (2017); *Foster v. Chatman*, 136 S. Ct. 1737, 1746 (2016). The Nevada Supreme Court's procedural default ruling analyzed whether, under this Court's recent precedent, Ennis had presented a new constitutional rule to overcome the procedural default. App. 002.

CONSTITUTIONAL AND STATUTORY PROVISIONS

The Supremacy Clause, Article VI, Clause 2, provides, in pertinent part:

> This Constitution . . . shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby . . . .

The Fourteenth Amendment to the United States Constitution provides, in pertinent part:

> No state shall . . . deprive any person of life, liberty, or property, without due process of law; nor deny any person within its jurisdiction the equal protection of the laws.

Nevada Revised Statute § 200.30, Degrees of Murder, provides, in pertinent part:

1. Murder of the first degree is murder which is:

(a) Perpetrated by means of poison, lying in wait or torture, or by any other kind of willful, deliberate and premeditated killing.

STATEMENT OF THE CASE

A. Ennis is convicted of first-degree murder without a finding of deliberation.

Nevada Revised Statutes § 200.030(1) enumerates the different ways in which a person can commit first-degree murder in Nevada. One of these methods is through a "willful, deliberate and premeditated killing." Nev. Rev. Stat. § 200.030(1)(a) (2018). Second-degree murder consists of "all other kinds of murder." Nev. Rev. Stat. § 200.30(2) (2018). For anyone charged with murder, the jury must decide between first or second-degree murder. Nev. Rev. Stat. § 200.030(3) (2018).

The difference in degree of murder carries tremendous significance with respect to punishment. A first-degree conviction can result in a sentence of death or life without parole. Nev. Rev. Stat. § 200.30(4)(a)-(b) (2018). The current maximum

sentence for a second-degree murder conviction is 10 to life. *See* Nev. Rev. Stat. § 200.30(5) (2018). Prior to a 1995 amendment changing the range of punishment, the maximum sentence for second-degree murder was 5 to life. Nev. Rev. Stat. § 200.30(5) (1994).

Petitioner Bruce Mayo Ennis was convicted of first-degree murder on the theory he committed the willful, deliberate and premeditated killing of his step-father on September 25, 1992. However, there was evidence at his trial questioning whether Ennis deliberated prior to the murder. This evidence showed that the murder occurred in the midst of a heated and violent struggle between the two men, who had a tumultuous relationship. *See* App. 092-094.

At trial, the jury was given the following problematic instruction defining first-degree murder, known as the *Kazalyn* instruction,[1] which did not define deliberation as a separate element:

> Premeditation is a design, a determination to kill, distinctly formed in the mind at any moment before or at the time of the killing.
>
> Premeditation need not be for a day, an hour or even a minute. It may be as instantaneous as successive thoughts of the mind. For if the jury believes from the evidence that the act constituting the killing has been preceded by and has been the result of premeditation, no matter how rapidly the premeditation is followed by the act constituting the killing, it is willful, deliberate and premeditated murder.

App. 106. Prior to Ennis' trial, the Nevada Supreme Court had upheld this instruction as an accurate definition of the intent element of first-degree murder.

[1] *See Kazalyn v. State*, 825 P.2d 578, 583–84 (Nev. 1992).

Powell v. State, 838 P.2d 921, 926-27 (Nev. 1992), *vacated on other grounds*, 511 U.S. 79 (1994); *Kazalyn v. State*, 825 P.2d 578, 583-84 (Nev. 1992).

Based upon his conviction for first-degree murder, Ennis was sentenced to life without the possibility of parole. App. 104-105. The Nevada Supreme Court affirmed the conviction on December 30, 1997, App. 100-102, and the conviction became final under state law on March 30, 1998, when the time for seeking review in this Court expired. *Nika v. State*, 198 P.3d 839, 848 n.52 (Nev. 2008).

B. The Nevada Supreme Court narrows the definition of first-degree murder, but applies it only prospectively.

On February 28, 2000, nearly three years after Ennis' conviction became final, the Nevada Supreme Court decided *Byford v. State*, 994 P.2d 700 (Nev. 2000). In *Byford*, the court disapproved of the *Kazalyn* instruction because it did not define premeditation and deliberation as separate elements of first-degree murder. *Id.* at 713–14. It reasoned:

> By defining only premeditation and failing to provide deliberation with any independent definition, the *Kazalyn* instruction blurs the distinction between first- and second-degree murder. [Our] further reduction of premeditation and deliberation to simply "intent" unacceptably carries this blurring to a complete erasure.

Id. at 713.

The court narrowed the meaning of the first-degree murder statute by requiring the jury to find deliberation as a separately defined element. *Id.* at 714. The court emphasized that deliberation is a "critical element of the *mens rea* necessary for first-degree murder," which requires the jurors to find, "before acting to kill the victim, [the defendant] weighed the reasons for and against his action, considered its consequences, distinctly formed a design to kill, and did not act simply from a rash, unconsidered impulse." *Id.* at 713–14.

A few months later, the Nevada Supreme Court held any error with respect to the *Kazalyn* instruction was not of constitutional magnitude and only applied prospectively. *Garner v. State*, 6 P.3d 1013, 1025 (Nev. 2000).

C. This Court agrees to decide whether the federal constitution requires a new statutory interpretation to apply retroactively, but then leaves the question open.

Right before the decision in *Byford*, this Court granted certiorari in *Fiore v. White* to determine "when, or whether, the Federal Due Process Clause requires a State to apply a new interpretation of a state criminal statute retroactively to cases on collateral review." *Fiore v. White*, 531 U.S. 225, 226 (2001). However, while the case was being litigated in this Court, the Pennsylvania Supreme Court indicated that it had clarified, not changed, the meaning of the criminal statute. This "clarification" made the retroactivity question "disappear[ ]." *Bunkley v. Florida*, 538 U.S. 835, 840 (2003). This Court explained a clarification is available to any defendant as it merely clarified the law that was in existence at the time of the defendant's conviction. *Fiore*, 531 U.S. at 228. As a result, a clarification "presents no issue of retroactivity." *Id.* Instead, *Fiore* concerned a different due process violation, namely whether the State had presented enough evidence to prove all elements of the crime beyond a reasonable doubt. *Fiore*, 531 U.S. at 228–29 (citing *Jackson v. Virginia*, 443 U.S. 307, 316 (1979); and *In re Winship*, 397 U.S. 358, 363 (1970)).

Two years later, in *Bunkley v. Florida*, this Court considered the implications of a new, or changed, interpretation of a criminal statute narrowing its scope. Once again, this Court did not reach the question of retroactivity. *Bunkley*, 538 U.S. at 841. Rather, it concluded that such a change in law would establish the same due process violation at issue in *Fiore* if the change occurred prior to the conviction becoming final. *Id.* at 840–42. The problem in *Bunkley* was the Florida Supreme

Court had not indicated precisely when that change occurred. *Id.* at 841–42. This Court remanded the case to the state court to determine whether a *Fiore* error occurred. *Id.*

D. Nevada limits the retroactivity of statutory interpretation decisions to "clarifications" of the law and not "changes."

In *Teague v. Lane*, 489 U.S. 288 (1989), this Court established a retroactivity framework for cases on collateral review in federal court. This framework replaced the retroactivity standard established in *Linkletter v. Walker*, 381 U.S. 618 (1965), which analyzed the retroactivity of a new rule on a case by case basis by examining the purpose of the new rule, the reliance of the states on prior law, and the effect on the administration of justice of a retroactive application. *Id.* at 636–40. This standard did not lead to consistent results. *Teague*, 489 U.S. at 302.

Teague established a uniform approach for retroactivity on collateral review. Under *Teague*, a new rule does not, as a general matter, apply to convictions that were final when the new rule was announced. *Montgomery v. Louisiana*, 136 S. Ct. 718, 728 (2016). However, *Teague* recognized two categories of rules that are not subject to its general retroactivity bar. First, courts must give retroactive effect to new watershed rules of criminal procedure implicating the fundamental fairness and accuracy of the criminal proceeding. *Id.* Second, and the exception at issue here, courts must give retroactive effect to new substantive rules. *Id.* "A rule is substantive rather than procedural if it alters the range of conduct or the class of persons that the law punishes." *Schriro v. Summerlin*, 542 U.S. 348, 353 (2004).

Under the federal retroactivity framework, the substantive rule exception "includes decisions that narrow the scope of a criminal statute by interpreting its terms." *Schriro*, 542 U.S. at 351–52 (citing *Bousley v. United States*, 523 U.S. 614, 620–21 (1998)). "New elements alter the range of conduct the statute punishes,

rendering some formerly unlawful conduct lawful or vice versa." *Id.* at 354. When a decision narrows an interpretation, it "necessarily carr[ies] a significant risk that a defendant stands convicted of 'an act that the law does not make criminal.'" *Bousley*, 523 U.S. at 620–21 (quoting *Davis v. United States*, 417 U.S. 333, 346 (1974)). This Court has emphasized, "it is only Congress, and not the courts, which can make conduct criminal." *Id.* at 621.

The Nevada Supreme Court has, in substantial part, adopted the *Teague* framework for determining the retroactive effect of new rules in Nevada state courts. *Clem v. State*, 81 P.3d 521, 530–31 (Nev. 2003); *Colwell v. State*, 59 P.3d 463, 471–72 (Nev. 2002).

However, there is one significant difference between the Nevada retroactivity rules and those adopted by this Court. In contrast to the federal rule, the Nevada Supreme Court has imposed a complete bar on the retroactive application of new, narrowing interpretations of a substantive criminal statute. *Nika v. State*, 198 P.3d 839, 850–51, 859 (Nev. 2008); *Clem*, 81 P.3d at 52-29. It has reasoned that only constitutional rules raise retroactivity concerns while decisions interpreting a criminal statute are matters of state law without retroactivity implications. *Nika*, 198 P.3d at 850–51; *Clem*, 81 P.3d at 529, 531. According to the court, the only question with respect to who gets the benefit of a narrowing statutory interpretation is whether it represents a "clarification" or a "change" in state law. *Nika*, 198 P.3d at 850; *Clem*, 81 P.3d at 529, 531. Relying upon *Fiore* and *Bunkley*, it has held, as a matter of due process, a "clarification" applies to all cases while a "change" applies to only those cases in which the judgment has yet to become final. *Id.*

The Nevada Supreme Court eventually applied these concepts to *Byford*'s narrowing interpretation of the first-degree murder statute. It characterized the *Byford* decision as a change, as opposed to a clarification, of the statute. *Nika*, 198

P.3d at 849–50. The court emphasized *Byford* involved a matter of statutory interpretation and not a matter of constitutional law. *Nika*, 198 P.3d at 850. The court reaffirmed its retroactivity rules—"if a rule is new but not a constitutional rule, it has no retroactive application to convictions that are final at the time of the change in law." *Id.*

Acknowledging the new interpretation narrowed the scope of the crime, the court concluded, as a matter of due process, those defendants whose convictions had yet to become final at the time of *Byford* should have been allowed to obtain the benefit of *Byford*. *Id.* at 850, 859 (overruling its prior decision in *Garner* that *Byford* applied only prospectively). But it held, as a matter of state law, the new, narrowing interpretation had no retroactive effect. *Id.* As a result, petitioners like Ennis, whose convictions became final prior to *Byford*, were not entitled to *Byford*'s benefit.

E. This Court creates the new constitutional rule of retroactivity in *Montgomery v. Louisiana* and clarifies its scope and application in *Welch v. United States*.

On January 25, 2016, this Court decided *Montgomery v. Louisiana*, 136 S. Ct. 718 (2016). The issue in *Montgomery* was whether *Miller v. Alabama*, 132 S. Ct. 2455 (2012), which prohibited mandatory life sentences for juvenile offenders under the Eighth Amendment, applied retroactively. *Montgomery*, 136 S. Ct. at 725.

The initial question this Court addressed was whether it had jurisdiction to review the retroactivity question. It concluded it did. This Court had previously "le[ft] open the question whether *Teague*'s two exceptions are binding on the States as a matter of constitutional law." *Montgomery*, 136 S. Ct. at 729. It now held that the Constitution required state collateral review courts to give retroactive effect to new substantive constitutional rules. *Id.* It stated, "*Teague*'s conclusion establishing the retroactivity of new substantive rules is best understood as resting upon constitutional premises." *Id.* "States may not disregard a controlling constitutional

command in their own courts." *Id.* at 727 (citing *Martin v. Hunter's Lessess*, 1 Wheat. 304, 340–41, 344 (1816)).

This Court concluded *Miller* was a new substantive rule; the states, therefore, had to apply it retroactively on collateral review. *Montgomery*, 136 S. Ct. at 732.

On April 18, 2016, this Court decided *Welch v. United States*, 136 S. Ct. 1257 (2016). The primary issue in *Welch* was whether *Johnson v. United States*, 135 S. Ct. 2551 (2015), which invalidated the residual clause in the ACCA as unconstitutionally vague, applied retroactively. *Welch*, 136 S. Ct. at 1260–61, 1264. More specifically, this Court considered whether *Johnson* fell under the substantive rule exception to *Teague*. *Id.* at 1264–65.

This Court defined a substantive rule as one that "'alters the range of conduct or the class of persons that the law punishes.'" *Id.* (quoting *Schriro*, 542 U.S. at 353). "'**This includes decisions that narrow the scope of a criminal statute by interpreting its terms**, as well as constitutional determinations that place particular conduct or persons covered by the statute beyond the State's power to punish.'" *Id.* at 1265 (quoting *Schriro*, 542 U.S. at 351–52) (emphasis added)); *see also Welch,* 136 S.Ct. at 1267 (stating, in a parenthetical, "A decision that modifies the elements of an offense is normally substantive rather than procedural') (quoting *Schriro*, 542 U.S. at 354).

This Court concluded that *Johnson* was substantive. *Id.* In reaching this conclusion, this Court adopted the new "substantive function" test for determining whether a new rule is substantive, as opposed to procedural. *Id.* at 1266. It explained the *Teague* balance did not depend on the characterization of the underlying constitutional guarantee as procedural or substantive. "It depends instead on whether the new rule itself has a procedural function or a substantive function—that is, whether it alters only the procedures used to obtain the conviction, or alters instead the range of conduct or class of persons that the law punishes." *Id.*

This Court also rejected an argument to adopt a different framework for the *Teague* analysis. *Welch*, 136 S. Ct. at 1265-67. Relevant to statutory interpretation cases, this Court disagreed with the claim that a rule is only substantive when it limits Congress' power to act. It pointed out that some of the Court's "substantive decisions do not impose such restrictions." *Id.* at 1267.

The "clearest example" was *Bousley v. United States*, 523 U.S. 614 (1998). *Welch*, 136 S. Ct. at 1267. The question in *Bousley* was whether *Bailey v. United States*, 516 U.S. 137 (1995), was retroactive. *Id.* In *Bailey*, this Court had "held as a matter of statutory interpretation that the 'use' prong [of 18 U.S.C. § 924(c)(1)] punishes only 'active employment of the firearm' and not mere possession." *Welch*, 136 S. Ct. at 1267 (quoting *Bailey*). This Court in *Bousley* had "no difficulty concluding that *Bailey* was substantive, as it was a decision 'holding that a substantive federal criminal statute does not reach certain conduct.'" *Id.* (quoting *Bousley*).

The *Welch* Court stated that *Bousley* did not fit under the proposed *Teague* framework as Congress amended § 924(c)(1) in response to *Bailey*. *Welch*, 136 S. Ct. at 1267. It concluded, "*Bousley* thus contradicts the contention that the *Teague* inquiry turns only on whether the decision at issue holds that Congress lacks some substantive power." *Id.*

Rejecting the suggestion that statutory construction cases are substantive because they define what Congress always intended the law to mean, this Court stated that statutory interpretation cases are substantive solely because they meet the criteria of the substantive rule exception to *Teague*:

> Neither *Bousley* nor any other case from this Court treats statutory interpretation cases as a special class of decisions that are substantive because they implement the intent of Congress. **Instead, decisions that interpret a statute are**

> **substantive if and when they meet the normal criteria for a substantive rule: when they "alte[r] the range of conduct or the class of persons that the law punishes."**

Welch, 136 S. Ct. at 1267 (emphasis added; quoting *Schriro*).

F. Ennis files a second state petition arguing that the new constitutional rule of retroactivity requires the state courts to apply *Byford* to his case.

On April 13, 2017, within one year of *Welch* being decided, Ennis filed a second state post-conviction petition arguing that he was now entitled to the benefit of *Byford* as a result of *Montgomery* and *Welch*. App. 071-097.

He argued *Montgomery* established a new constitutional rule, namely the *Teague* substantive rule exception was now a federal constitutional rule the states must apply. *Id.* He further argued *Welch* clarified that this substantive exception included narrowing interpretations of a statute, which would include the Nevada Supreme Court's decision in *Byford* (holding deliberation was a separate and distinct element of murder). *Id.* The State moved to dismiss arguing the petition was procedurally barred and *Montgomery* and *Welch* do not establish good cause to overcome the procedural default. App. 047-070. Ennis opposed, repeating his argument that the procedural bars could be overcome by a showing of good cause based on a new constitutional rule.

The state district court dismissed the petition. App. 005-029. It concluded that *Byford* was a procedural rule rather than a substantive one. *Id.* The court further concluded Ennis could not overcome the procedural bars (untimely and successive) through a showing of good cause nor could he demonstrate prejudice. *Id.*

Ennis appealed to the Nevada Supreme Court, raising the same constitutional argument he raised in the state district court. In its unpublished order, the Nevada Supreme Court stated that, in *Montgomery* and *Welch*, this Court retroactively

applied substantive rules of constitutional law. App. 002. The court said, in contrast, *Byford* was a matter of statutory interpretation unrelated to any constitutional issues. It concluded that, because *Byford* did not establish a new constitutional rule, neither *Welch* nor *Montgomery* undermined its prior holdings that a change in law does not need to apply retroactively. Id. (citing *Branham*, 434 P.3d at 316–17).

REASONS FOR GRANTING THE PETITION

A. Certiorari is warranted to resolve the intractable split that developed in the state courts on the retroactivity of a narrowing interpretation of a substantive criminal statute after this Court left the question open in *Fiore*.

1. The states have implemented different and opposing retroactivity approaches.

There is a clear split in the state courts as to the retroactive effect of narrowing interpretations of substantive criminal statutes. After this Court left open the question of whether the federal constitution requires the retroactive application of a new interpretation, the state courts veered off on divergent paths. The majority of state courts have concluded, as this Court has, that these decisions deserve full retroactive effect as they are substantive. A group of states have adopted standards that allow, but do not require, the retroactive application of these decisions. At the other end of the spectrum, there are at least three states that do not allow for retroactive application, including, as shown above, Nevada. There are also a handful of states that have adopted standards that severely limit the retroactive effect of these decisions. Overall, the states have adopted divergent and opposing approaches.

a. Seventeen states follow the federal rule and grant full retroactivity because the new interpretation is substantive.

The most common approach among the state courts is to grant full retroactivity to new, narrowing interpretations of substantive criminal statutes because they

represent new substantive rules.[2] *See State v. Towery*, 64 P.3d 828, 832 (Ariz. 2003) ("Substantive rules determine the meaning of a criminal statute." (citing *Bousley*)); *Chao v. State*, 931 A.2d 1000, 1002 (Del. 2007) (new substantive decisions, including narrowing interpretations, apply retroactively "when a defendant has been convicted for acts that are not criminal"); *Luke v. Battle*, 565 S.E.2d 816, 819 (Ga. 2002) ("an appellate decision holding that a criminal statute no longer reaches certain conduct is a ruling of substantive law" and must apply retroactively); *State v. Young*, 406 P.3d 868, 871 (Id. 2017) (new statutory interpretation will apply retroactively if it "substantively alters punishable conduct"); *People v. Edgeston*, 920 N.E.2d 467, 471 (Ill. App. Ct. 2009) ("Illinois follows the federal rule that a decision that narrows a substantive criminal statute must have full retroactive effect in collateral attacks." (internal citation omitted)); *Jacobs v. State*, 835 N.E.2d 485, 489-91 (Ind. 2005) (narrowing statutory interpretation was substantive and applied retroactively because new rule concerned itself with "'what conduct is criminal and [what is] the punishment to be imposed for such conduct,'" citing 1 Wayne R. LaFave, *Substantive Criminal Law* § 1.2 (2d ed. 2003)); *Allen v. State*, 42 A.3d 708, 720 (Md. Ct. App. 2012) (new statutory decision is fully retroactive "when the change affected the integrity of the fact finding process or the change involved the ability to try a defendant or impose punishment"); *Chambers v. State*, 831 N.W.2d 311, 326 (Minn. 2013) ("a new rule is 'substantive' if the rule '*narrow[s]* the scope of a criminal statute by interpreting its terms'" (quoting *Schriro*)), *overruled on other grounds*, *Jackson v. State*, 883 N.W.2d

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[2] At one point, Nevada appeared to have adopted this rule, indicating a decision that "address[ed] the elements of an offense" was retroactive because it was substantive under *Schriro*. *Mitchell v. State*, 149 P.3d 33, 38 n.25 (Nev. 2006). However, the Nevada Supreme Court later "disavow[ed] any language in *Mitchell v. State* suggesting that a new nonconstitutional rule of criminal procedure applies retroactively." *Nika*, 198 P.3d at 850 n.78.

272 (Minn. 2016); *Jones v. State*, 122 So.3d 698, 702 (Miss. 2013) ("[S]ubstantive rules . . . include[ ] decisions that narrow the scope of a criminal statute by interpreting its terms."(quoting *Schriro*)); *State v. Cook*, 272 P.3d 50, 55-56 (Mont. 2002) (new statutory interpretation applies retroactively if substantive); *Morel v. State*, 912 N.W.2d 299, 304 (N.D. 2018) ("substantive rules include decisions that narrow the scope of a criminal statute"); *Commonwealth v. Cunningham*, 81 A.3d 1, 19 (Pa. 2013) (substantive rules include "'decisions that narrow the scope of a criminal statute by interpreting its terms'" (quoting *Schriro*)); *State v. Robertson*, 438 P.3d 491, 511-13 (Utah May 15, 2017) (new interpretation of substantive criminal statute is fully retroactive because it is substantive); *State v. White*, 944 A.2d 203, 207-08 (Vt. 2007) ("New substantive rules include those that 'narrow the scope of a criminal statute by interpreting its terms . . .'" (quoting *Schriro*)); *State v. Lagundoye*, 674 N.W.2d 526, 531 (Wisc. 2004); *see also In re Miller*, 14 Cal.App.5th 960, 978–79, 222 Cal. Rptr.3d 960, 979 (2017) (new interpretation given retroactive effect because "a court acts in excess of its jurisdiction by imposing a punishment for conduct not prohibited by the relevant panel statute").

Notably, similar to petitioner's argument here, one state has used the combination of *Montgomery* and *Welch* to apply the federal substantive rule exception to the states. *State v. Parker*, 96 N.E.3d 1183, 1188 (Ohio App. 2017), *appeal allowed*, 93 N.E.3d 1002 (Ohio 2018).

b. Twelve states apply a case-by-case approach to determine retroactivity using public policy factors.

Six state courts use a *Linkletter*-like case-by-case public policy analysis to determine whether to provide a new statutory interpretation retroactive effect. While these courts look to similar public policy factors, they utilize several different tests.

For example, three of these states have created a presumption in favor of retroactivity and use the *Linkletter* or other public policy factors to determine whether retroactivity should be precluded for the new interpretation on equitable grounds. *See Luurtsema v. Comm'r of Corr.*, 12 A.3d 817, 832 (Conn. 2011) (general presumption in favor of retroactivity, but no relief where continued incarceration would not represent gross miscarriage of justice); *Policano v. Herbert*, 859 N.E.2d 484, 495 (N.Y. 2006) (weighing three *Linkletter* factors to determine retroactivity of new narrowing interpretation with emphasis on purpose of rule and avoiding miscarriage of justice); *State v. Harwood*, 746 S.E.2d 445, 450–51 (N.C. App. 2013) (new statutory interpretation is retroactive unless *Linkletter* factors dictate otherwise).

Although these tests would appear to favor retroactivity for narrowing interpretations, it is far from automatic. For example, the New York Court of Appeals refused to retroactively apply a narrowing interpretation of its second-degree murder statute because such a bar "pose[d] no danger of a miscarriage of justice." *Policano*, 859 N.E.2d at 495–96.

Three other states use *Linkletter* or a similar public policy analysis on a case-by-case basis to determine the retroactivity of a new interpretation of a criminal statute, but do not utilize a presumption in favor of retroactivity. *See State v. Jess*, 184 P.3d 133, 401–02 (Hawaii 2008) (*Linkletter* test used to determine retroactivity of judicial decisions announcing new rule); *Salinas v. State*, 523 S.W.3d 103, 111–12 (Tex. Crim. App. 2017) (utilizing *Linkletter* test for new statutory interpretations); *see also Rivers v. State*, 889 P.2d 288, 291–92 (Okla. Crim. App. 1994) (using *Linkletter* test to determine retroactivity of statutory interpretation decision).

Six states utilize *Linkletter* or other public policy standards to determine retroactivity in general in their state post-conviction proceedings, but have not

specifically indicated these retroactivity standards apply to new interpretations of a statute (although *Linkletter* is a broad enough standard that it probably does). *See generally State v. Smart*, 202 P.3d 1130, 1136 (Alaska 2009) (establishing *Linkletter* as retroactivity standard); *Kelley v. Gordon*, 465 S.W.3d 842, 845–46 (Ark. 2015) (public policy concerns, including fundamental fairness, evenhanded justice, and finality, dictate whether new rule applies retroactively); *People v. Maxson*, 759 N.W.2d 817, 820–22 (Mich. 2008) (utilizing *Linkletter* approach for retroactivity); *State v. Whitfield*, 107 S.W.3d 253, 268 (Mo. 2003) (establishing *Linkletter* as retroactivity standard); *State v. Feal*, 944 A.2d 599, 607–09 (N.J. 2008) (retroactivity of new rule determined using *Linkletter* test); *State v. Mares*, 335 P.3d 487, 501 (Wy. 2014) (retroactivity of new rule determined using *Linkletter* test).

While *Linkletter* is generally viewed as a more flexible standard than *Teague*, *see*, *e.g.*, *Whitfield*, 107 S.W.3d at 267, the *Linkletter* factors do not automatically require retroactive application of any particular new rule, including narrowing interpretations. Retroactivity is determined on a case-by-case basis. As this Court identified in *Teague*, such a test leads to inconsistent results. It can potentially work as a narrower retroactivity test than the federal substantive rule exception.

c. Fourteen states have adopted the *Teague* standard but have not yet indicated whether it applies to narrowing statutory interpretations.

In addition to the seventeen states that have fully embraced the federal rule, an additional fourteen states have explicitly adopted *Teague* as their retroactivity standard for their state collateral proceedings. These states, however, have not yet indicated whether their "substantive rule" exception would include new, narrowing statutory interpretations. *Ex parte Harris*, 947 So.2d 1139, 1143–47 (Ala. 2005); *Edwards v. People*, 129 P.3d 977, 981–83 (Co. 2006); *Leonard v. Commonwealth*, 279 S.W.3d 151, 160–61 (Ky. 2009); *State v. Tate*, 130 So.3d 829, 834 (La. 2013);

Carmichael v. State, 927 A.2d 1172, 1179 (Maine 2007); *Commonwealth v. Sullivan*, 681 N.E.2d 1184, 1188 (Mass. 1997); *State v. Glass*, 905 N.W.2d 265, 274–75 (Neb. 2018); *Petition of State*, 103 A.3d 227, 232 (N.H. 2014); *Kersey v. Hatch*, 237 P.3d 683, 691 (N.M. 2010); *Page v. Palmateer*, 84 P.3d 133, 138 (Ore. 2004); *Pierce v. Wall*, 941 A.2d 189, 195-96 (R.I. 2008); *Aiken v. Byars*, 765 S.E.2d 572, 575 (S.C. 2014); *Siers v. Weber*, 851 N.W.2d 731, 742–43 (S.D. 2014); *see also Kelson v. Commonwealth*, 604 S.E.2d 98, 101 (Va. Ct. App. 2004) (new substantive rules apply retroactively, citing *Schriro*).

d. Six states have limited or barred retroactivity for new substantive statutory interpretations.

At the other end of the spectrum, there are six states that greatly limit or completely bar retroactive application of new interpretations of a substantive criminal statute. As stated above, Nevada has imposed a complete retroactivity bar for new interpretations of a substantive criminal statute. In Nevada, only new constitutional rules can apply retroactively. Nonconstitutional rules, such as a new interpretation of a criminal statute, has no retroactivity implications. *Nika*, 198 P.3d at 850–51; *Clem*, 81 P.3d at 529, 531. In Nevada, a narrowing interpretation is available to all defendants if the Nevada courts classify it as a "clarification." If the Nevada courts classify the interpretation as a "change," it is only available to those petitioners whose convictions have yet to become final. *Id.*

Iowa has directly followed Nevada's lead. The Iowa Supreme Court has held that, even though new narrowing interpretations of a criminal statute are substantive, they only apply retroactively if they are deemed to be a "clarification." If there has been a "change" in substantive law, it does not apply retroactively. *Goosman v. State*, 764 N.W.2d 539, 542–45 (Iowa 2009) (discussing *Clem*); *accord Nguyen v. State*, 878 N.W.2d 744, 754-55 (Iowa 2016).

Kansas has also utilized the clarification/change dichotomy for narrowing interpretations. *Easterwood v. State*, 44 P.3d 1209, 1216–23 (Kan. 2002). In *Easterwood*, the Kansas Supreme Court held that a new statutory interpretation did not need to apply retroactively because it was a "new decision" and not a clarification like the one at issue in *Fiore*. *Id.* at 1223.

Washington suggested a similar approach in a recent case. The law in Washington has been that a first interpretation of a statute is retroactive. *Matter of Colbert*, 380 P.3d 504, 507–08 (Wash. 2016). However, the Washington Supreme Court stated that the reason supporting retroactivity for a first interpretation—"the court's construction is deemed to be what the statute has meant since its enactment"—"does not logically appear to apply" for a "reinterpretation" of a statute. *Id.* at 508 n.5. Nevertheless, it left the question open.

Soon after *Fiore*, Florida also adopted the clarification/change dichotomy to determine the retroactivity of a decision narrowing the interpretation of a statute. *State v. Klayman*, 835 So.2d 248, 252–53 (Fla. 2002). However, Florida retreated from this approach and instead adopted a rule that essentially bars retroactive application of new interpretations of a substantive criminal statute. *See State v. Barnum*, 921 S.2d 513, 524 (Fla. 2005) (for new interpretation to be applied retroactively, interpretation must be "constitutional in nature" and "must constitute a development of fundamental significance").

Tennessee also has a bar on the retroactive application of new statutory interpretations. Unlike the other states with a bar, Tennessee's bar is statutory. A petitioner in Tennessee can only obtain retroactive application of a new constitutional rule. T.C.A. §§ 40-30-102(b)(1), 40-30-117(a)(1). Under these statutes, the Tennessee Supreme Court has refused to retroactively apply a decision interpreting a provision

of its capital sentencing statute because it was not a constitutional rule, only an interpretation of a statute. *Keen v. State*, 398 S.W.3d 594, 609 (Tenn. 2012).

Finally, West Virginia has established a presumption against retroactivity for new interpretations narrowing the meaning of a statute. *State v. Kennedy*, 735 S.E.2d 905, 924 n.16 (W. Va. 2012). The West Virginia Supreme Court has listed several public policy factors it would consider in determining whether to apply a new interpretation retroactively. *Id.* However, it has indicated that where "substantial public issues are involved, arising from statutory or constitutional interpretations that represent a clear departure from prior precedent, prospective application will ordinarily be favored." *Id.*

2. This Court should establish uniformity and require all states to follow the federal rule.

As can be seen, there is an incredible amount of inconsistency on this issue throughout the state courts. It ranges from full retroactivity, to a presumption in favor of retroactivity, to a public policy approach on a case-by-case basis, to a presumption against retroactivity, all the way down to a complete retroactivity bar. Despite the clarity of the federal rule requiring full retroactivity for narrowing interpretations of a substantive criminal statute, the diverging approaches in the states result in similarly situated defendants throughout the country being treated vastly different depending on where the crime occurred. In fact, because the federal retroactivity rule is broader than those in several states, there could be inconsistent results *in the same case*.[3]

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[3] For example, in Nevada, a petitioner could raise a substantive claim relying on a new narrowing interpretation in a post-conviction proceeding. Because there is no retroactivity, the Nevada courts would find the claim procedurally barred. *Pellegrini v. State*, 34 P.3d 519, 536 (Nev. 2001) (procedural bars are mandatory).

The new constitutional rule of retroactivity established in *Montgomery* and clarified in *Welch* provides the necessary vehicle in which to establish uniformity in the state courts. Sup. Ct. Rule 10(b). As discussed in more detail below, read together, these two cases require the state courts to apply the "substantive rule" exception as has been defined by this Court. This federal "substantive rule" exception clearly applies to decisions narrowing the interpretation of a criminal statute. Further, this rule looks to the effect of the narrowing interpretation, not its characterization as a change or clarification, to determine retroactivity.

The issue here is of exceptional importance. New narrowing interpretations of substantive criminal statutes are the essence of what makes a new rule substantive. Substantive law is the law that "declares what conduct is criminal and prescribes the punishment to be imposed for such conduct." Wayne R. LaFave, Substantive Criminal Law § 1.2 (3d ed. 2017). When a decision narrows an interpretation of a statute, it "necessarily carr[ies] a significant risk that a defendant stands convicted of 'an act that the law does not make criminal.'" *Bousley*, 523 U.S. at 620–21 (internal quotations omitted). No matter in which jurisdiction it occurs, a narrowing interpretation of the elements of a crime is substantive and creates the risk that the defendant was convicted, and suffering punishment for, a crime he did not commit.

For the narrowing change at issue here, a jury's verdict as to the appropriate degree of murder represents one of the most consequential decisions a jury can make.

However, in a federal habeas proceeding this petitioner would potentially be able to raise the same substantive claim and overcome any procedural hurdle by establishing a miscarriage of justice on the basis of the narrowing interpretation. *Bousley*, 523 U.S. at 623-24 (new substantive narrowing interpretation provides basis for arguing miscarriage of justice). Because there was no merits determination in state court, he would receive *de novo* review of the claim in federal court, *Cone v. Bell*, 556 U.S. 449, 472 (2009), in which he would be able to obtain the retroactive benefit of the new narrowing interpretation under the federal retroactivity rule. *Welch,* 136 S. Ct. at 1264–65; *Schriro*, 542 U.S. at 351–52.

See Mullaney v. Wilbur, 421 U.S. 684, 698 (1975). In Nevada, it can mean the difference between death or life without parole for a first-degree murder versus a chance for parole after as little as five or ten years for a second-degree murder. *See* Nev. Rev. Stat. § 200.30(4)(a)-(b) & (5) (2018); Nev. Rev. Stat. § 200.30(5) (1994) (second-degree murders committed before 1995 had minimum term of 5 years).

This Court should grant certiorari and declare that the state courts must follow the constitutional command of this Court and follow the federal "substantive rule" exception. *Harper v. Virginia Dept. of Taxation*, 509 U.S. 86, 100 (1993) ("Supremacy Clause does not allow federal retroactivity doctrine to be supplanted by the invocation of a contrary approach to retroactivity under state law"). Without this Court's intervention, the disparate and opposing approaches in the state courts on this critically important issue would be "contrary to the Supremacy Clause and the Framer's decision to vest in 'one Supreme Court' the responsibility and authority to ensure the uniformity of federal law." *Danforth v. Minnesota*, 552 U.S. 264, 292 (2008) (Roberts, C.J., dissenting).

B. Certiorari review is warranted because the Nevada Supreme Court's refusal to follow the new constitutional rule of retroactivity is clearly erroneous.

This Court will review a decision on state post-conviction review when the lower courts have misapplied settled law. *Rippo*, 137 S. Ct. at 907; *Wearry v. Cain*, 136 S. Ct. 1002, 1007 (2016) (citing cases). Here, the Nevada courts clearly misapplied this Court's recent precedents in *Montgomery* and *Welch*. Those cases require the state courts to apply the federal substantive rule exception as a matter of the federal constitution and in the manner that this Court has defined it. The federal substantive rule exception includes decisions narrowing the interpretation of a substantive criminal statute. The Nevada courts' failure to follow this rule was clearly erroneous.

1. The new constitutional rule of retroactivity requires the state courts to grant full retroactive effect to decisions narrowing the interpretation of a substantive criminal statute.

In *Montgomery*, this Court, for the first time, constitutionalized the "substantive rule" exception to the *Teague* retroactivity rules. *Montgomery*, 136 S. Ct. at 729 ("*Teague*'s conclusion establishing the retroactivity of new substantive rules is best understood as resting upon constitutional premises."). As a federal constitutional rule, the state courts must give the "substantive rule" exception "at least as broad a scope as [this Court] requires. *Colwell*, 59 P.3d at 471; *accord Montgomery*, 136 U.S. at 727 ("States may not disregard a controlling constitutional command in their own courts.").

Thus, this Court's interpretation of the federal "substantive rule" exception provides the constitutional floor for how this rule must be applied in state courts. *Danforth*, 552 U.S. at 287 (state court decision must "satsif[y] the miminum federal requirements" the Supreme Court has outlined, quoting *Harper*, 509 U.S. at 100); *see also Harper*, 509 U.S. at 102 ("State law may provide relief beyond the demands of federal due process, but under no circumstances may it confine petitioners to a lesser remedy" (citation omitted)); *Yates v. Aikens*, 484 U.S. 211, 218 (1988) ("Since it has considered the merits of the federal claim, [state court] has a duty to grant the relief that federal law requires"); *see also*, Ruthanne M. Deutsch, *Federalizing Retroactivity Rules: The Unrealized Promise of Danforth v. Minnesota and the Unmet Obligation of state Courts to Vindicate Federal Federal Constitutional Rights*, 44 Fla. St. U. L. Rev. 53, 69 (Fall 2016) ("[F]ederal retroactivity rules now establish a floor, not a celing: states may be more generous than federal courts in providing retroactive relief, but they may not be stingier").

In *Welch*, this Court made absolutely clear that the federal constitutional "substantive rule" exception to *Teague* applies to statutory interpretation cases. The

Welch Court was explicit: the substantive rule *Teague* exception "**includes decisions that narrow the scope of a criminal statute by interpreting its terms**." *Welch*, 136 S. Ct. at 1264–65 (emphasis added); *accord id.* at 1267 ("A decision that modifies the elements of an offense is normally substantive rather than procedural" (quoting *Schriro*, 542 U.S. at 354)).

In fact, the *Welch* Court not only repeated what it had stated in *Schriro,* the exception applies to statutory interpretation cases, it went much further. It explained, for the first time, how to apply the exception in those cases. "[D]ecisions that interpret a statute are substantive if and when they meet the normal criteria for a substantive rule: when they 'alter the range of conduct or the class of persons that the law punishes.'" *Id.* at 1267 (quoting *Schriro*, 542 U.S. at 353). It explained that this was the *only* criteria for determining whether a decision that interprets the meaning of a statute is substantive. *Id.* This Court had never articulated this principle so clearly in a prior case.

The broad scope of the substantive rule exception is also readily apparent in *Welch*'s discussion of its prior decision in *Bousley v. United States*, 523 U.S. 614 (1998). Like *Welch*, *Bousley* involved a question about retroactivity: whether an earlier Supreme Court decision, *Bailey v. United States*, 516 U.S. 137 (1995), which narrowly interpreted a federal criminal statute, would apply to cases on collateral review. As *Welch* put it, "[t]he Court in *Bousley* had no difficulty concluding that *Bailey* was substantive, as it was a decision 'holding that a substantive federal criminal statute does not reach certain conduct.'" *Welch*, 136 S.Ct. at 1267 (quoting *Bousley*, 523 U.S. at 620).

But *Bailey* did not turn on constitutional principles; it was a statutory interpretation decision, not a constitutional decision. Nonetheless, this Court in *Welch* classified *Bailey* as substantive under a *Teague* analysis. Thus, as *Welch*

illustrates, it is irrelevant whether a decision rests on constitutional principles—if the decision interpreting a statute is substantive, it is retroactive under the "substantive rule" exception to *Teague*.

Welch also introduced a new test for determining whether a new rule is substantive. This Court held, for the first time, that a new rule is substantive so long as it has "a substantive function." *Welch*, 136 S.Ct. at 1266. A rule has a "substantive function" when it "alters the range of conduct or class of persons that the law punishes." *Id.* When a decision narrows the scope of a criminal statute, it has such a substantive function, and is therefore retroactive. *Id.* at 1265–67.

In sum, *Welch* held that *all* statutory interpretation cases that narrow the scope of a criminal statute—and not just those that are based on a constitutional rule—qualify as "substantive" rules for the purpose of retroactivity analysis. That rule is binding in state courts, just the same as in federal courts. *See Montgomery*, 136 S.Ct. at 727. After *Montgomery* and *Welch*, those States that have not applied full retroactivity to new interpretations are now wrong.

This includes Nevada. Contrary to the new constitutional rule, the Nevada courts have consistently held that a new narrowing interpretation of a substantive criminal statute has no retroactive implications. *Nika*, 198 P.3d at 850–51; *Clem*, 81 P.3d at 529, 531; *Branham*, 434 P.3d at 316–17. This retroactivity bar remains the rule in Nevada.

In its unpublished order, the Nevada Supreme Court stated that, in *Montgomery* and *Welch*, this Court retroactively applied substantive rules of constitutional law. App. 002. "Conversely, in *Byford* we merely interpreted a statute unrelated to any constitutional issues. . . . Because *Byford* did not establish a new constitutional rule, neither *Welch* nor *Montgomery* undermine *Nika* and provide good

cause to raise the *Byford* claim in the instant petition." App. 002 (citing *Branham*, 434 P.3d at 316–17).

This is an incorrect application of this Court's precedent. As shown above, the new constitutional rule of retroactivity requires the state courts to apply the substantive rule exception in the same manner that this Court applies it. That exception includes decisions interpreting a statute by narrowing its terms. *Welch* made that abundantly clear throughout its discussion on how the substantive rule operates. *Welch*, 136 S.Ct. at 1264–65, 1267. The lower court was not free to disregard an essential part of this Court's decision. *See, e.g.*, *Seminole Tribe of Florida v. Florida*, 517 U.S. 44, 67 (1996) ("When an opinion issues for the Court, it is not only the result but also those portions of the opinion necessary to that result by which [lower courts] are bound").

Byford is a substantive rule and the federal constitution requires its retroactive application. *Byford* narrowed the scope of the first-degree murder statute by requiring deliberation to be found as a separately defined element. This new interpretation of the elements of the crime is obviously substantive as it altered the range of conduct the statute defines to be criminal. *Welch*, 136 S. Ct. at 1264–65 (substantive rule exception "includes decisions that narrow the scope of a criminal statute by interpreting its terms"); *accord id.* at 1267 ("A decision that modifies the elements of an offense is normally substantive rather than procedural" (quoting *Schriro*, 542 U.S. at 354)). Indeed, the Nevada Supreme Court has already acknowledged that *Byford* is substantive. *Nika*, 198 P.3d at 850, 859. That is all that matters in the retroactivity analysis. Nevada was clearly wrong in refusing to grant *Byford* full retroactivity.

Further, contrary to the Nevada Supreme Court's reasoning, the new interpretation does not need a constitutional basis for it to fall under the substantive

rule. *Welch*'s discussion of *Bousley* establishes this. If the decision interpreting a statute is substantive, it is retroactive under the "substantive rule" exception to *Teague*. The substantive function test requires it. In all respects, the Nevada Supreme Court's analysis is wrong.[4]

The Nevada Court of Appeals has issued the only published opinion in Nevada on this issue after *Montgomery* and *Welch*. *See Branham*, 434 P.3d at 316–17 (cited in the unpublished order in this case).[5] In *Branham*, the court rejected the argument that this Court's recent cases require state courts to retroactively apply narrowing interpretations of criminal statutes. *Branham*, 434 P.3d at 316–17. The Court of Appeals concluded that *Montgomery* and *Welch* did not alter *Teague*'s "threshold requirement that the new rule at issue must be a constitutional rule." *Id.* Mirroring the Nevada Supreme Court's prior precedent, the court reasoned *Byford* was not a constitutional rule, so it did not need to be applied retroactively under *Teague*. *Id.*

This reasoning is contrary to the express language of *Welch*. As discussed before, *Welch* held the "substantive rule" exception includes narrowing interpretations of criminal statutes:

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[4] In any event, there is every reason to believe a change in the interpretation of the elements of a criminal statute implicates due process concerns. Under *Montgomery*, because such a narrowing interpretation is substantive, its retroactivity has a constitutional premise. *Montgomery*, 136 S. Ct. at 729 ("*Teague*'s conclusion establishing the retroactivity of new substantive rules is best understood as resting upon constitutional premises"). In fact, the rationale underlying the substantive rule exception finds common footing with fundamental due process notions. *Compare Welch*, 136 S. Ct. at 1266 (substantive change will "necessarily carry a significant risk that a defendant stands convicted of an act that the law does not make criminal" (internal quotations omitted)); *with Fiore,* 531 U.S. at 228–29 (due process violation for State to convict defendant without proving all of the elements beyond a reasonable doubt).

[5] The petitioner in *Branham* has filed a separate petition seeking certiorari from the Nevada Court of Appeals' published opinion.

> A rule is substantive rather than procedural if it alters the range of conduct or the class of persons that the law punishes. **This includes decisions that narrow the scope of a criminal statute by interpreting its terms**, as well as constitutional determinations that place particular conduct or persons covered by the statute beyond the State's power to punish.

Welch, 136 S.Ct. at 1264–65 (emphasis added) (internal citations omitted). This is just one of several explicit statements indicating the same. *See, e.g., id.* at 1267 (stating in a parenthetical that "[a] decision that modifies the elements of an offense is normally substantive rather than procedural"). As *Welch* indicates, determining whether a statutory interpretation decision is substantive is a "*Teague* inquiry." *Id.* at 1267.

The Court of Appeals did not acknowledge this Court's express language from *Welch* or explain why it does not control here. Its failure to grapple with these clear statements in *Welch* is not sustainable. Byford modified the elements of first-degree murder, narrowing the scope of the statute. It is substantive. The Nevada courts are required to apply it retroactively.

2. In light of *Welch*'s substantive function test, the change versus clarification dichotomy does not guide the retroactivity analysis.

Welch also undermines those courts that have used the change versus clarification dichotomy as the measuring stick for who gets the benefit of a narrowing interpretation. In light of *Welch*, the distinction between a "change" and a "clarification" plays no role in controlling the retroactivity for narrowing interpretations.

To the contrary, *Welch* made clear that the *only* relevant question with respect to the retroactivity of a statutory interpretation decision is whether the new interpretation meets the definition of a substantive rule. If it meets the definition of a substantive rule, it does not matter whether that narrowing statutory

interpretation is labeled a "change" or a "clarification," because both types of decisions have "a substantive function." *Welch*, 136 S.Ct. at 1266.

In fact, the change/clarification dichotomy was never meant to control the retroactivity question for narrowing interpretations. *Fiore* and *Bunkley* themselves specifically say the issue is not about retroactivity. Those cases focus instead on the due process requirement that every element of a crime be proven beyond a reasonable doubt. *See In re Winship*, 397 U.S. 358, 364 (1970). The question of whether the constitution requires a state court to retroactively apply a narrowing interpretation of a statute was left open in those cases. The combination of *Montgomery* and *Welch* now provides an answer to that question.

Welch also undermines the Nevada Supreme Court's original rejection of the federal retroactivity rule in *Clem*. In *Clem* the petitioner had argued that *Bousley* required the state courts to retroactively apply a state court's decisions interpreting substantive provisions of Nevada's criminal statutes. *Clem*, 81 P.3d at 531. The Nevada Supreme Court rejected this argument, concluding *Bousley* was just "correlative to the rule reiterated in *Fiore* for state court decisions clarifying state statutes." *Id.* According to that court, "in *Bousley*, the Supreme Court implicitly indicates that its decisions which interpret the substantive provisions of federal statutes are to be regarded as clarifications of the law." *Id.*

That reasoning is no longer valid after *Welch*. The Nevada Supreme Court believed that a narrowing interpretation from this Court is always retroactive because it is a clarification. Like in *Fiore,* this Court would simply be declaring what the law always was. *See Fiore*, 531 U.S. at 228 (clarification indicates what law was at time of conviction). The *Welch* Court specifically rejected an argument that "statutory construction cases are substantive because they define what Congress always intended the law to mean. . . . ." *Welch*, 136 S. Ct. at 1267. This Court

emphasized that statutory interpretation cases are not substantive because they implement the intent of Congress. "Instead, decisions that interpret a statute are substantive if and when they meet the normal criteria for a substantive rule: when they alter the range of conduct or the class of persons that the law punishes." *Id.* (citations omitted).

A court's characterization of an interpretation of a statute has no impact on who gets its benefit. A statutory interpretation decision is not retroactive because it implements the original intent of the legislature or articulates what the law has always meant. As this Court stated in *Welch*, all that matters in determining retroactivity is whether the new interpretation is substantive. The state courts that have rejected this approach, like the lower courts here, are clearly wrong.

* * * *

Petitioner believes that *Montgomery* and *Welch* provides a basis for summary reversal. However, to the extent the legal principle at issue here has not been clearly established, this Court should grant certiorari on the question presented as it is a crucial outstanding retroactivity question left open after *Montgomery*. *See Carlos M. Vasquez* and *Stephen I. Vladeck*, The Constitutional Right to Collateral Post-Conviction Review, 103 Va. L. Rev. 905, 948 (2017) (stating *Montgomery* raised the question previously left open in *Fiore*, "Does the federal Constitution also require the retroactive application of new substantive rules of state law, or is the retroactivity of such rules purely a matter of state law?"). A decision requiring the state courts to follow the federal rule will have a wide-ranging impact as it will alter the law in all but the seventeen states that have already adopted it.

Whether it is through summary reversal or plenary review, this Court should take the opportunity to impose a uniform application of the federal "substantive rule" exception to ensure defendants whose convictions were final at the time of a

narrowing interpretation of a substantive criminal statute are not suffering punishment for a crime they may not have committed.

CONCLUSION

For the foregoing reasons, Bruce Ennis respectfully request that this Court grant his petition for writ of certiorari and reverse the judgment of the Nevada Supreme Court. In the alternative, Ennis requests this Court grant certiorari, vacate the decision of the Nevada Supreme Court, and remand for further proceedings.

Dated this 29th day of May, 2019.

Respectfully submitted,

Rene Valladares
Federal Public Defender of Nevada

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No.

October Term, 2018

In the
Supreme Court of the United States

Bruce Mayo Ennis,
Petitioner,
v.
Brian E. Williams, Sr. Warden,
Respondent.

On Petition for Writ of Certiorari to the
Nevada Supreme Court

Certificate of Service

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I, Jonathan Kirshbaum, an attorney who is authorized to file a Petition for Writ of Certiorari on behalf of Bruce Mayo Ennis, hereby certify that all parties required to be served have been served on this 29th day of May, 2019, in accordance with Rule 28.4(a), one copy of the foregoing Petition for Writ of Certiorari, Appendix, and Motion for Leave to Proceed *In Forma Pauperis* by delivering said copy to a third party commercial carrier for delivery, to Aaron D. Ford, Attorney General, 100 N Carson Street, Carson City, Nevada 89701, and Jonathan VanBoskerck, Chief Deputy District Attorney, 200 East Lewis Avenue, Las Vegas, Nevada 89155, counsel for the respondent herein. I further certify that in accordance with Rule 29.3, an electronic version of the foregoing was also served.

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APP. 001

IN THE SUPREME COURT OF THE STATE OF NEVADA

BRUCE MAYO ENNIS,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 74457

FILED

JAN 17 2019

ELIZABETH A. BROWN
CLERK OF SUPREME COURT
BY S. Young
DEPUTY CLERK

ORDER OF AFFIRMANCE

This appeal challenges a district court order denying a postconviction petition for a writ of habeas corpus. Eighth Judicial District Court, Clark County; Michael Villani, Judge.

As appellant Bruce Ennis filed his petition over 19 years after the remittitur issued on his direct appeal, *Ennis v. State*, Docket No. 28322 (Order Dismissing Appeal, December 30, 1997), his petition was untimely. NRS 34.726(1). Ennis' petition is successive because he has previously filed a postconviction petition for a writ of habeas corpus, and it constitutes and abuse of the writ as he raised claims new and different from those raised in his prior petition.[1] *See* NRS 34.810(1)(b)(2); NRS 34.810(2). Ennis' petition was procedurally barred absent a demonstrate of good cause and actual prejudice. *See* NRS 34.726(1); NRS 34.810(3). To demonstrate good cause, Ennis must show that "an impediment external to the defense prevented him . . . from complying with the state procedural default rules." *Hathaway v. State*, 119 Nev. 248, 252, 71 P.3d 503, 506 (2003). Ennis could meet this burden by showing that the "legal basis for a claim was not reasonably

[1]*See Ennis v. State*, Docket No. 43017 (Order of Affirmance, November 3, 2004).

available." *Id.* (internal quotation marks omitted). Further, because the State specifically pleaded laches, Ennis was required to overcome the presumption of prejudice to the State. *See* NRS 34.800(2).

Ennis argues that the district court erred in denying his petition as procedurally barred. He asserts that he was entitled to the retroactive application of *Byford v. State*, 116 Nev. 215, 994 P.2d 700 (2000), because recent United States Supreme Court decisions in *Welch v. United States*, 136 S. Ct. 1257 (2016), and *Montgomery v. Louisiana*, 136 S. Ct. 718 (2016), changed the framework under which retroactivity is analyzed and provide good cause to excuse the procedural bars.

We disagree with Ennis' reading of *Welch* and *Montgomery*. In both decisions, the United States Supreme Court retroactively applied substantive rules of constitutional law. *Montgomery*, 136 S. Ct. at 736; *Welch*, 136 S. Ct. at 1265. Conversely, in *Byford* we merely interpreted a statute unrelated to any constitutional issues. *Nika v. State*, 124 Nev. 1272, 1288, 198 P.3d 839, 850 (2008); *see Garner v. State*, 116 Nev. 770, 788-89, 6 P.3d 1013, 1025 (2000) (holding that this court does not consider retroactive application of new rules unless they involve a constitutional dimension), *overruled on other grounds by Sharma v. State*, 118 Nev. 648, 56 P.3d 868 (2002). Because *Byford* did not establish a new constitutional rule, neither *Welch* nor *Montgomery* undermine *Nika* and provide good cause to raise the *Byford* claim in the instant petition. *Branham v. Warden*, 134 Nev., Adv. Op. 99 at 6 (Ct. App. Dec. 13, 2018) ("Nothing in [*Welch* or *Montgomery*] alters *Teague*'s threshold requirement that the new rule at issue must be a constitutional rule."). Moreover, even if *Byford* applied, Ennis failed to demonstrate actual prejudice. *See Hogan v. State*, 109 Nev. 952, 960, 860 P.2d 710, 716 (1993) (providing that petitioner must demonstrate errors

worked to his actual and substantial disadvantage). The State introduced evidence that Ennis told several witnesses that he wanted to kill the victim, obtained a weapon for that purpose, and took the victim's property after the killing. Considering this evidence, he failed to demonstrate a reasonable likelihood that he would not have been convicted of first-degree murder had the *Byford* instruction been used.[2]

Ennis also argues that he could demonstrate a fundamental miscarriage of justice to overcome the procedural bars. A petitioner may overcome procedural bars by demonstrating he is actually innocent such that the failure to consider his petition would result in a fundamental miscarriage of justice. *Pellegrini v. State*, 117 Nev. 860, 887, 34 P.3d 519, 537 (2001). "It is important to note in this regard that 'actual innocence' means factual innocence, not mere legal insufficiency." *Bousley v. United States*, 523 U.S. 614, 623 (1998). A petitioner demonstrates actual innocence by showing that "it is more likely than not that no reasonable juror would have convicted him in light of . . . new evidence." *Calderon v. Thompson*, 523 U.S. 538, 559 (1998) (quoting *Schlup v. Delo*, 513 U.S. 298, 327 (1995)); *see also Pellegrini v. State*, 117 Nev. 860, 887, 34 P.3d 519, 537 (2001); *Mazzan v. Warden*, 112 Nev. 838, 842, 921 P.2d 920, 922 (1996). Ennis argues that *Byford* narrowed the definition of first-degree murder. Such a change in the definition of first-degree murder does not render Ennis factually innocent. Accordingly, he failed to demonstrate a fundamental miscarriage of justice.

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[2]In addressing whether appellate counsel was ineffective for failing to argue error under *Byford*, this court concluded in a prior appeal that there was sufficient evidence of premeditation and deliberation. *Ennis*, Docket No. 43017, Order of Affirmance at 5.

Lastly, Ennis failed to overcome the presumption of prejudice to the State pursuant to NRS 34.800(2). We therefore conclude the district court did not err by denying Ennis' petition as procedurally barred, and we ORDER the judgment of the district court AFFIRMED.

_____, J.
Hardesty

_____, J.
Stiglich

_____, J.
Silver

cc: Hon. Michael Villani, District Judge
Federal Public Defender/Las Vegas
Attorney General/Carson City
Clark County District Attorney
Eighth District Court Clerk

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DISTRICT COURT
CLARK COUNTY, NEVADA

THE STATE OF NEVADA,

Plaintiff,

-vs-

BRUCE MAYO ENNIS,
#0280037

Defendant.

CASE NO: 92C110002

DEPT NO: XVII

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

DATE OF HEARING: SEPTEMBER 18, 2017
TIME OF HEARING: 4:00 PM

THIS CAUSE having come on for hearing before the Honorable Judge Michael Villani, District Judge, on the18th Day of September, 2017, the Petitioner, represented by Courtney Kirschner, the Respondent being represented by Steven B. Wolfson, Clark County District Attorney, by and through Binu G. Palal, Deputy District Attorney, and the Court having considered the matter, including briefs, transcripts, arguments of counsel, and documents on file herein, now therefore, the Court makes the following findings of fact and conclusions of law:

FINDINGS OF FACT, CONCLUSIONS OF LAW

Procedural History

On December 21, 1992, the State charged Bruce Mayo Ennis ("Petitioner") by way of Information with Murder with Use of a Deadly Weapon, Robbery with Use of a Deadly

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Weapon, and Possession of Firearm by Ex-Felon. Petitioner's jury trial commenced on November 29, 1995, and on December 4, 1995, the jury returned a verdict finding Petitioner guilty of Murder of the First Degree with Use of a Deadly Weapon but not guilty of Robbery with Use of a Deadly Weapon.[1] On January 18, 1996, Petitioner pleaded guilty by way of a Guilty Plea Agreement to the charge of Possession of Firearm by Ex-Felon.

On that same day, Petitioner was adjudged guilty of both Count 1 (Murder of the First Degree with Use of a Deadly Weapon) and Count 3 (Possession of Firearm by Ex-Felon) and sentenced to the Nevada State Prison as follows: as to Count 1, life without the possibility of parole plus a consecutive term of life without the possibility of parole for the use of a deadly weapon; as to Count 3, 6 years, to run concurrent with Count 1. The Judgment of Conviction was entered on January 30, 1996. On December 30, 1997, the Nevada Supreme Court issued an Order dismissing Petitioner's appeal. Remittitur issued on January 21, 1998.

On December 29, 1998, Petitioner filed his first habeas petition. On March 11, 2004, the Court denied the petition and entered its Findings of Fact, Conclusions of Law and Order to that effect on April 5, 2004. On November 3, 2004, the Nevada Supreme Court issued an Order affirming the district court's denial of the first habeas petition. Remittitur issued on November 30, 2004.

On April 13, 2017, Petitioner filed the instant Petition for Writ of Habeas Corpus (Post-Conviction), which now constitutes his second habeas petition. The State filed its Response on May 26, 2017.

Analysis

This Court will deny the Petition on the basis that it is procedurally barred under both NRS 34.726(1) and NRS 34.810(2). The Court also finds that laches under NRS 34.800(2) applies here and that prejudice to the State should be presumed given that more than 19 years have elapsed between the Nevada Supreme Court's decision on Petitioner's direct appeal of the

[1] On the first day of trial, the Court granted Petitioner's Motion to Sever Count Three of the Instant Information. On that same day, the parties also agreed to waive the separate penalty hearing and stipulated to sentencing by the judge in the event the jury were to return a verdict of first-degree murder.

Judgment of Conviction and the filing of the instant Petition.

I. The Petition Is Procedurally Barred Under Both NRS 34.726(1) And NRS 34. 810(2), And Laches Under NRS 34.800(2) Is Applicable Here.

The instant Petition has been filed more than 19 years after the Nevada Supreme Court issued its remittitur on Petitioner's direct appeal from the Judgment of Conviction. Accordingly, it is untimely under NRS 34.726(1). In an attempt to establish good cause to excuse this untimeliness, Petitioner relies on the United States Supreme Court's decisions in Montgomery v. Louisiana, __ U.S. __, 136 S. Ct. 718 (2016), and Welch v. United States, __ U.S. __, 136 S. Ct. 1257 (2016). Montgomery and Welch, however, fail to serve as good cause necessary to overcome NRS 34.726(1)'s procedural bar. Moreover, because the instant Petition constitutes Petitioner's second habeas petition, it is successive under NRS 34.810(2). And for the same reasons that Montgomery and Welch fail to constitute good cause to overcome NRS 34.726(1)'s procedural bar, it likewise fails to constitute good cause sufficient to overcome NRS 34.810(2)'s procedural bar. Lastly, because more than 19 years have elapsed between the Nevada Supreme Court's decision on Petitioner's direct appeal of the Judgment of Conviction and the filing of the instant Petition, the Court finds that laches pursuant to NRS 34.800(2) is applicable here.

A. The Petition Is Untimely Under NRS 34.726(1), And Petitioner Has Failed To Establish Good Cause For Delay.

Under NRS 34.726(1), "a petition that challenges the validity of a judgment or sentence must be filed within 1 year after entry of the judgment of conviction or, if an appeal has been taken from the judgment, within 1 year after the appellate court of competent jurisdiction . . . issues its remittitur," absent a showing of good cause for delay. In State v. Eighth Judicial Dist. Court (Riker), the Nevada Supreme Court noted that "the statutory rules regarding procedural default are mandatory and cannot be ignored when properly raised by the State." 121 Nev. 225, 233, 112 P.3d 1070, 1075 (2005).

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Here, the Judgment of Conviction in Petitioner's case was filed on January 30, 1998. Petitioner filed a Notice of Appeal, and on December 30, 1997, the Nevada Supreme Court issued an Order dismissing Petitioner's appeal. Remittitur issued on January 21, 1998. Accordingly, Petitioner had until January 21, 1999, to file a timely Petition. The instant Petition, however, was filed on April 11, 2017—more than 18 years after the one-year deadline had expired. Such untimeliness can be excused if Petitioner can establish good cause for the delay. This, however, he has failed to do.

To show good cause for delay under NRS 34.726(1), a petitioner must demonstrate the following: (1) "[t]hat the delay is not the fault of the petitioner" and (2) that the petitioner will be "unduly prejudice[d]" if the petition is dismissed as untimely. To meet NRS 34.726(1)'s first requirement, "a petitioner must show that an impediment external to the defense prevented him or her from complying with the state procedural default rules." Hathaway v. State, 119 Nev. 248, 252, 71 P.3d 503, 506 (2003). "An impediment external to the defense may be demonstrated by a showing 'that the factual or legal basis for a claim was not reasonably available to counsel, or that some interference by officials, made compliance impracticable.' " Id. (quoting Murray v. Carrier, 477 U.S. 478, 488, 106 S. Ct. 2639 (1986)).

Petitioner attempts to meet this first requirement by arguing new case law. Specifically, he argues that Montgomery and Welch "represent a change in law that allows petitioner to obtain the benefit of Byford[2] on collateral review." In essence, Petitioner avers that Montgomery and Welch establish a legal basis for a claim that was not previously available. Petitioner's reliance on Montgomery and Welch is misguided.

Petitioner alleges that he received the following jury instruction on premeditation and deliberation:

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[2] Byford v. State, 116 Nev. 215, 235, 994 P.2d 700, 713 (2000), *cert. denied*, Byford v. Nevada, 531 U.S. 1016, 121 S. Ct. 576 (2000).

> Premeditation is a design, a determination to kill, distinctly formed in the mind at any moment before or at the time of the killing.
>
> Premeditation need not be for a day, an hour or even a minute. It may be as instantaneous as successive thoughts of the mind. For if the jury believes from the evIdence that the act constituting the killing has been preceded by and has been the result of premeditation, no matter how rapIdly the premeditation is followed by the act constituting the killing, it is willful, deliberate and premeditated murder.

Petition at 10. This instruction is known as the Kazalyn[3] instruction. To be sure, Petitioner Id. receive such an instruction. Instructions to the Jury, filed December 4, 1995, Instruction No. 8.

The Nevada Supreme Court held in Byford that this Kazalyn instruction Id. "not do full justice to the [statutory] phrase 'willful, deliberate and premeditated.' " 116 Nev. at 235, 994 P.2d at 713. As explained by the Court in Byford, the Kazalyn instruction "underemphasized the element of deliberation," and "[b]y defining only premeditation and failing to provide deliberation with any independent definition, the Kazalyn instruction blur[red] the distinction between first- and second-degree murder." 116 Nev. at 234-35, 994 P.2d at 713. Therefore, in order to make it clear to the jury that "deliberation is a distinct element of *mens rea* for first-degree murder," the Court directed "the district courts to cease instructing juries that a killing resulting from premeditation is 'willful, deliberate, and premeditated murder.' " Id. at 235, 994 P.2d at 713. The Court then went on to provide a set of instructions to be used by the district courts "in cases where defendants are charged with first-degree murder based on willful, deliberate, and premeditated killing." Id. at 236-37, 994 P.2d at 713-15.

Seven years later, in Polk v. Sandoval, the United States Court of Appeals for the Ninth Circuit weighed in on the issue. 503 F.3d 903 (9th Cir. 2007). There, the Ninth Circuit held that the use of the Kazalyn instruction violated the Due Process Clause of the United States

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[3] Kazalyn v. State, 108 Nev. 67, 825 P.2d 578 (1992).

Constitution because the instruction "relieved the state of the burden of proof on whether the killing was deliberate as well as premeditated." Id. at 909. In Polk, the Ninth Circuit took issue with the Nevada Supreme Court's conclusion in cases decided in the wake of Byford that "giving the Kazalyn instruction in cases predating Byford did not constitute constitutional error."[4] Id. at 911. According to the Ninth Circuit, "the Nevada Supreme Court erred by conceiving of the Kazalyn instruction issue as purely a matter of state law" insofar as it "failed to analyze its own observations from Byford under the proper lens of Sandstrom, Franklin, and Winship and thus ignored the law the Supreme Court clearly established in those decisions—that an instruction omitting an element of the crime and relieving the state of its burden of proof violates the federal Constitution." Id.

A little more than a year after Polk was decided, the Nevada Supreme Court addressed that decision in Nika v. State, 124 Nev. 1272, 1286, 198 P.3d 839, 849 (2008). In commenting on the Ninth Circuit's decision in Polk, the Court in Nika pointed out that "[t]he fundamental flaw . . . in Polk's analysis is the underlying assumption that Byford merely reaffirmed a distinction between 'willfulness,' 'deliberation' and 'premeditation.'" Id. Rather than being simply a clarification of existing law, the Nevada Supreme Court in Nika took the "opportunity to reiterate that Byford announced *a change in state law*." Id. (emphasis added). In rejecting the Ninth Circuit's reasoning in Polk, the Nevada Supreme Court noted that "[u]ntil Byford, we had not required separate definitions for 'willfulness,' 'premeditation' and 'deliberation' when the jury was instructed on any one of those terms." Id. Indeed, Nika explicitly held that "the Kazalyn instruction correctly reflected Nevada law before Byford." Id. at 1287, 198 P.3d at 850.

The Court in Nika then went on to affirm its previous holding that Byford is not retroactive. 124 Nev. at 1287, 198 P.3d at 850 (citing Rippo v. State, 122 Nev. 1086, 1097, 146 P.3d 279, 286 (2006)). For purposes here, Nika's discussion on retroactivity merits close

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[4] *See, e.g.,* Garner v. State, 6 P.3d 1013, 1025, 116 Nev. 770, 789 (2000), *overruled on other ground by* Sharma v. State, 118 Nev. 648, 56 P.3d 868 (2002).

analysis. The Court in Nika commenced its retroactivity analysis with Colwell v. State, 118 Nev. 807, 59 P.3d 463 (2002). In Colwell, the Nevada Supreme Court "detailed the rules of retroactivity, applying retroactivity analysis only to new constitutional rules of criminal law if those rules fell within one of two narrow exceptions." Nika, 124 Nev. at 1288, 198 P.3d at 850 (citing Colwell, 118 Nev. at 820, 59 P.3d at 531). Colwell, in turn, was premised on the United States Supreme Court's decision in Teague v. Lane, 489 U.S. 288, 109 S. Ct. 1060 (1989). A brief digression on Teague is therefore in order.

In Teague, the United States Supreme Court did away with its previous retroactivity analysis in Linkletter,[5] replacing it with "a general requirement of nonretroactivity of new rules in federal collateral review." Colwell, 118 Nev. at 816, 59 P.3d at 469-70 (citing Teague, 489 U.S. at 299-310, 109 S. Ct. at 1069-76). In short, the Court in Teague held that "new *constitutional* rules of criminal procedure will not be applicable to those cases which have become final before the new rules are announced." 489 U.S. at 310, 109 S. Ct. at 1075 (emphasis added). This holding, however, was subject to two exceptions: first, "a new rule should be applied retroactively if it places 'certain kinds of primary, private individual conduct beyond the power of the criminal law-making authority to proscribe,'" Id. at 311, 109 S. Ct. at 1075 (quoting Mackey v. United States, 401 U.S. 667, 692, 91 S. Ct. 1160, 1165 (1971) (Harlan, J., concurring in the judgments in part and dissenting in part)); and second, a new constitutional rule of criminal procedure should be applied retroactively if it is a "watershed rule[ ] of criminal procedure." Id. at 311, 109 S. Ct. at 1076 (citing Mackey, 401 U.S. at 693-94, 91 S. Ct. at 1165).

That Teague was concerned exclusively with new *constitutional* rules of criminal procedure is reinforced by reference to the very opinion from Justice Harlan relied on by the Court in Teague. *See* Mackey, 401 U.S. at 675-702, 91 S. Ct. at 1165-67. Justice Harlan's opinion in Mackey starts off acknowledging the nature of the issue facing the Court. *See* Id. at 675, 91 S. Ct. at 1165 ("These three cases have one question in common: the extent to which new *constitutional* rules prescribed by this Court for the conduct of criminal cases are

[5] Linkletter v. Walker, 381 U.S. 618, 85 S. Ct. 1731 (1965).

applicable to other such cases which were litigated under different but then-prevailing *constitutional* rules." (emphasis added)). And when outlining the two exceptions that were ultimately adopted by the Court in Teague, Justice Harlan explicitly acknowledged the constitutional nature of these exceptions. *See* Id. at 692, 91 S. Ct. at 1165 ("New 'substantive due process' rules, that is, those that place, *as a matter of constitutional interpretation*, certain kinds of primary, private individual conduct beyond the power of the criminal law-making authority to proscribe, must, in my view, be placed on a different footing." (emphasis added)); Id. at 693, 91 S. Ct. at 1165 ("Typically, it should be the case that any conviction free from federal *constitutional* error at the time it became final, will be found, upon reflection, to have been fundamentally fair and conducted under those procedures essential to the substance of a full hearing. However, in some situations it might be that time and growth in social capacity, as well as judicial perceptions of what we can rightly demand of the adjudicatory process, will properly alter our understanding of the bedrock procedural elements that must be found to vitiate the fairness of a particular conviction." (emphasis added)).

The Nevada Supreme Court's decision in Colwell further reinforces the notion that Teague's exceptions were concerned exclusively with new *constitutional* rules. *See* 118 Nev. at 817, 59 P.3d at 470. In Colwell, the Court provided examples of "new rules" that fall into either exception. As to the first exception, the Nevada Supreme Court explained that "the Supreme Court's holding that the *Fourteenth Amendment* prohibits states from criminalizing marriages between persons of different races" is an example of a new substantive rule of law that should be applied retroactively on collateral review. Id. (citing Mackey, 401 U.S. at 692 n.7, 91 S. Ct at 1165 n.7) (emphasis added). Noting that this first exception "also covers 'rules prohibiting a certain category of punishment for a class of defendants because of their status,' " Id. (quoting Penry v. Lynaugh, 492 U.S. 302, 329-30, 109 S. Ct. 2934, 2952-53 (1989), *overruled on other grounds by* Atkins v. Virginia, 536 U.S. 304, 122 S. Ct. 2242 (2002)), the Nevada Supreme Court cited "the Supreme Court's [ ] holding that the *Eighth Amendment* prohibits the execution of mentally retarded criminals" as another example of a new substantive rule of law that should be applied retroactively on collateral review. Id. (citing

Penry, 492 U.S. at 329-30, 109 S. Ct. at 2952-53) (emphasis added). As to the second exception, the Nevada Supreme Court cited "the right to counsel at trial"[6] as an example of a watershed rule of criminal procedure that should be applied retroactively on collateral review. Id. (citing Mackey, 401 U.S. at 694, 91 S. Ct. at 1165).

The Court in Colwell, however, found Teague's retroactivity analysis too restrictive and, therefore, while adopting its general framework, chose "to provide broader retroactive application of new constitutional rules of criminal procedure than Teague and its progeny require." Id. at 818, 59 P.3d at 470; *see also* Id. at 818, 59 P.3d at 471 ("Though we consider the approach to retroactivity set forth in Teague to be sound in principle, the Supreme Court has applied it so strictly in practice that decisions defining a constitutional safeguard rarely merit application on collateral review.").[7] First, the Court in Colwell narrowed Teague's definition of a "new rule," which it had found too expansive.[8] Id. at 819-20, 59 P.3d. at 472 ("We consider too sweeping the proposition, noted above, that a rule is new whenever any other reasonable interpretation or prior law was possible. However, a rule is new, for example, when the decision announcing it overrules precedent, or 'disapproves a practice this Court had arguably sanctioned in prior cases, or overturns a longstanding practice that lower courts had uniformly approved.' " (quoting Griffith v. Kentucky, 479 U.S. 314, 325, 107 S. Ct. 708, 714 (1987)). And second, the Court in Colwell expanded on Teague's two exceptions, which it had found too "narrowly drawn":

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[6] As per Gideon v. Wainwright, 372 U.S. 335, 83 S. Ct. 792 (1963), whose holding was premised the Sixth and Fourteenth Amendments—i.e., *constitutional* principles.

[7] As the Nevada Supreme Court explained in Colwell, it was free to deviate from the standard laid out in Teague so long as it observed the minimum protections afforded by Teague. *See* 118 Nev. at 817-18, 59 P.3d at 470-71; *see also* Johnson v. New Jersey, 384 U.S. 719, 733, 86 S. Ct. 1772, 1781 (1966)).

[8] This has the effect of affording greater protection than Teague insofar as defendants seeking collateral review here in Nevada will be able to avail themselves more frequently of the principle that "[i]f a rule is not new, then it applies even on collateral review of final cases." Colwell, 118 Nev. at 820, 59 P.3d at 472. Under Teague's expansive definition for "new rule," most rules would be considered new by Teague's standards and, thus, "given only prospective effect, absent an exception." Id. at 819, 59 P.3d at 471.

> When a rule is new, it will still apply retroactively in two instances: (1) if the rule establishes that it is unconstitutional to proscribe certain conduct as criminal or to impose a type of punishment on certain defendants because of their status or offense; or (2) if it establishes a procedure without which the likelihood of an accurate conviction is seriously diminished. These are basically the exceptions defined by the Supreme Court. But we do not limit the first exception to 'primary, private individual' conduct, allowing the possibility that other conduct may be constitutionally protected from criminalization and warrant retroactive relief. And with the second exception, we do not distinguish a separate requirement of 'bedrock' or 'watershed' significance: if accuracy is seriously diminished without the rule, the rule is significant enough to warrant retroactive application.

Id. at 820, 59 P.3d at 472. Notwithstanding this expansion of the protections afforded in Teague, the Court in Colwell never lost sight of the fact that Teague's retroactivity analysis focuses on new rules of *constitutional* concern. If the new rule of criminal procedure is not constitutional in nature, Teague's retroactivity analysis has no bearing.

One year later in Clem v. State, the Nevada Supreme Court reaffirmed the modified Teague retroactivity analysis set out in Colwell. 119 Nev. 615, 626-30, 81 P.3d 521, 529-32 (2008). Notably, the Court in Clem explained that it is "not required to make retroactive its new rules of state law that do not implicate constitutional rights." Id. at 626, 81 P.3d at 529. The Court further noted that "[t]his is true even where [its] decisions overrule or reverse prior decisions to narrow the reach of a substantive criminal statute." Id. The Court then provided the following concise overview of the modified Teague retroactivity analysis set out in Colwell:

> Therefore, on collateral review under Colwell, if a rule is not new, it applies retroactively; if it is new, but not a constitutional rule, it does not apply retroactively; and if it is new and constitutional, then it applies retroactively only if it falls within one of Colwell's delineated exceptions.

Id. at 628, 81 P.3d at 531. Thus, Clem reiterated that if the new rule of criminal procedure is not constitutional in nature, Teague's retroactivity analysis has no relevance. Id. at 628-629, 81 P.3d at 531 ("Both Teague and Colwell require limited retroactivity on collateral review,

but neither upset the usual rule of nonretroactivity for rules that carry no constitutional significance.").[9]

It is on the basis of Colwell and Clem that the Court in Nika affirmed its previous holding[10] that Byford is not retroactive. 119 Nev. at 1288, 198 P.3d at 850 ("We reaffirm our decisions in Clem and Colwell and maintain our course respecting retroactivity analysis—if a rule is new but not a constitutional rule, it has no retroactive application to convictions that are final at the time of the change in the law."). The Court in Nika then explained how the change in the law made by Byford "was a matter of interpreting a state statute, not a matter of constitutional law." Id. Accordingly, because it was not a new *constitutional* rule of criminal procedure of the type contemplated by Teague and Colwell, the change wrought in Byford was not to have retroactive effect on collateral review to convictions that were final before the change in the law.

Neither Montgomery nor Welch alter Teague's—and, by extension, Colwell's—underlying premise that the two exceptions to the general rule of nonretroactivity must implicate constitutional concerns before coming into play. In Montgomery, the United States Supreme Court had to consider whether Miller v. Alabama, 567 U.S. __, 132 S. Ct. 2455 (2012), which held that a mandatory sentence of life without parole for juvenile homicide offenders violates the Eighth Amendment's prohibition on "cruel and unusual punishment,"

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[9] Petitioner omitted any mention of Colwell or Clem, which were central to Nika's retroactivity analysis regarding convictions that were final at the time of the change in the law. Instead, Petitioner cited Nika's preceding analysis of why "the change effected by Byford properly applied to [the defendant in Polk, 503 F.3d at 910] as a matter of due process." Nika, 124 Nev. at 1287, 198 P.3d at 850; *see* Petition at 9. To be sure, the Court in Nika, in conducting this analysis, did rely on the retroactivity rules set out in Bunkley v. Florida, 538 U.S. 835, 123 S. Ct. 2020 (2003), and Fiore v. White, 531 U.S. 225, 121 S. Ct. 712 (2001), which, according to Petitioner were "drastically changed," Petition at 9, by the United States Supreme Court's decisions in Montgomery and Welch. Whether or not this is true is of no moment. The analysis in Nika regarding retroactivity in Polk had absolutely no bearing on Nika's later analysis of the rules of retroactivity respecting convictions that were final at the time of the change in the law.

[10] *See* Rippo, 122 Nev. at 1097, 146 P.3d at 286.

had to be applied retroactively to juvenile offenders whose convictions and sentences were final at the time when Miller was decided. __ U.S. at __, 136 S. Ct. at 725. To answer this question, the Court in Montgomery employed the retroactivity analysis set out in Teague. Id. at __, 136 S. Ct. at 728-36. As to whether Miller announced a new "substantive rule of constitutional law," Id. at __, 136 S. Ct. at 734, such that it fell within the first of the two exceptions announced in Teague, the Court in Montgomery commenced its analysis by noting that "the 'foundation stone' for Miller's analysis was [the] Court's line of precedent holding certain punishments disproportionate when applied to juveniles." Id. at ___, 136 S. Ct. at 732. This "line of precedent" included the Court's previous decision in Graham v. Florida, 560 U.S. 48, 130 S. Ct. 2011 (2010), and Roper v. Simmons, 543 U.S. 551, 125 S. Ct. 1183 (2005), the holdings of which were premised on constitutional concerns—namely, the Eighth Amendment. __ U.S. at __, 136 S. Ct. at 723 (explaining how Graham "held that the Eighth Amendment bars life without parole for juvenile nonhomicide offenders" and how Roper "held that the Eighth Amendment prohibits capital punishment for those under the age of 18 at the time of their crimes"). After elaborating further on the considerations discussed in *Roper* and Graham that underlay the Court's holding in Miller, Id. at __, 136 S. Ct. at 733-34, the Court went on to conclude the following:

> Because Miller determined that sentencing a child to life without parole is excessive for all but the rare juvenile offender whose crime reflects irreparable corruption, [ ] it rendered life without parole *an unconstitutional penalty* for a class of defendants because of their status—that is, juvenile offenders whose crimes reflect the transient immaturity of youth. As a result, Miller announced a substantive rule of *constitutional* law. Like other substantive rules, Miller is retroactive because it necessarily carr[ies] a significant risk that a defendant—here, the vast majority of juvenile offenders—faces a punishment that the law cannot impose upon him.

Id. at __, 136 S. Ct. at 734 (internal citations omitted) (quotation marks omitted) (alteration in original) (emphasis added).

Petitioner, however, got caught up in Montgomery's preceding jurisdictional analysis in which it had to decide, as a preliminary matter, whether a State is under an "obligation to

give a new rule of constitutional law retroactive effect in its own collateral review proceedings." Id. at __, 136 S. Ct. at 727; *see* Petition at 17, 19, 25. Petitioner made much ado about Montgomery's discussion on this front, arguing that the Court in Montgomery "established a new rule of constitutional law, namely that the 'substantive' exception to the Teague rule applies in state courts as a matter of due process." Petition at 25. This assertion, while true, shortchanges the Court's jurisdictional analysis. In addressing the jurisdictional question and discussing Teague's first exception to the general rule of nonretroactivity in collateral review proceedings, Montgomery actually reinforces the notion that Teague's retroactivity analysis is relevant only when considering a new *constitutional* rule. *See, e.g.*, Id. at __, 136 S. Ct. at 727 ("States may not disregard a controlling, *constitutional* command in their own courts." (emphasis added)); Id. at __, 136 S. Ct. at 728 (explaining that under the first exception to the general rule of nonretroactivity discussed in Teague, "courts must give retroactive effect to new substantive rules of *constitutional* law" (emphasis added)); Id. at __, 136 S. Ct. at 729 ("The Court now holds that when a new substantive rule of *constitutional* law controls the outcome of a case, the Constitution requires state collateral review courts to give retroactive effect to that rule." (emphasis added)); Id. at __, 136 S. Ct. at 729-30 ("Substantive rules, then, set forth categorical *constitutional* guarantees that place certain criminal laws and punishments altogether beyond the State's power to impose. It follows that when a State enforces a proscription or penalty barred *by the Constitution*, the resulting conviction or sentence is, by definition, unlawful." (emphasis added)); Id. at __, 136 S. Ct. at 730 ("By holding that new substantive rules are, indeed, retroactive, Teague continued a long tradition of giving retroactive effect to *constitutional* rights that go beyond procedural guarantees." (emphasis added)); Id. at __, 136 S. Ct. at 731 ("A penalty imposed pursuant to an *unconstitutional* law is no less void because the prisoner's sentence became final before the law was held unconstitutional. There is no grandfather clause that permits States to enforce punishments the *Constitution* forbids." (emphasis added)); Id. at __, 136 S. Ct. at 731-32 ("Where state collateral review proceedings permit prisoners to challenge the lawfulness of their confinement, States cannot refuse to give retroactive effect to a substantive *constitutional*

right that determines the outcome of that challenge." (emphasis added)). Montgomery's holding that State courts are to give retroactive effect to new substantive rules of constitutional law simply makes universal what has already been accepted as common practice in Nevada for almost 15 years—i.e., that new rules of constitutional law are to have retroactive effect in State collateral review proceedings. *See* Colwell, 118 Nev. at 818-21, 59 P.3d at 471-72; Clem, 119 Nev. at 628-29, 81 P.3d at 530-31.

Petitioner, however, really just uses Montgomery as a bridge to explain why he believes that the United States Supreme Court's more recent decision in Welch mandates that Byford is retroactive even as to those convictions that were final at the time that it was decided. Thus, the focal point is not so much Montgomery—which, again, made constitutional (i.e., that State courts must give retroactive effect to new substantive rules of constitutional law) what the Nevada Supreme Court has already accepted in practice—but rather Welch, which according to Petitioner, "indicated that the *only* requirement for determining whether an interpretation of a criminal statute applies retroactivity is whether the interpretation narrows the class of individuals who can be convicted of the crime." Petition at 9 (emphasis in original). Once again Petitioner shortchanged the Supreme Court's analysis by making such an unqualified assertion—this time to the point of misrepresenting the Court's holding in Welch.

In Welch, the Court had to consider whether Johnson v. United States, 576 U.S. __, 135 S. Ct. 2551 (2015), which held that the residual clause of the Armed Career Criminal Act ("ACCA") of 1984, 18 U.S.C. § 924(e)(2)(B)(ii), was unconstitutionally void for vagueness, is retroactive in cases on collateral review. __ U.S. at __, 136 S. Ct. at 1260-61. Not surprisingly, to answer this question, the Court resorted to the retroactivity analysis set out in Teague. Id. at __, 136 S. Ct. at 1264-65. The Court commenced its application of the Teague retroactivity analysis by recognizing that "[u]nder Teague, as a general matter, 'new *constitutional* rules of criminal procedure will not be applicable to those cases which have become final before the new rules are announced,' " Id. at __, 136 S. Ct. at 1264 (quoting Teague, 489 U.S. at 310, 109 S. Ct. at 1075 (emphasis added)), and that this general rule was subject to the two exceptions that have already been discussed at great length above. Finding

it "undisputed that Johnson announced a new rule," the Court explained that the specific question at issue was whether this new rule was "substantive." Id.[11] Then, upon concluding that "Johnson changed the substantive reach of the [ACCA]" by " 'altering the range of conduct or the class of persons that the [Act] punishes,' " the Court held that "the rule announced in Johnson is substantive." Id. at __, 136 S. Ct. at 1265 (quoting Schriro v. Summerlin, 542 U.S. 348, 353, 124 S. Ct. 2519, 2523 (2004)).

Salient in the Court's analysis was the principle announced in Schriro, that "[a] rule is substantive rather than procedural if it alters the range of conduct or the class of persons that the law punishes." 542 U.S. at 353, 124 S. Ct. at 2523; *see* Welch, __ U.S. at __, 136 S. Ct. at 1264-65 (citing Schriro, 542 U.S. at 353, 124 S. Ct. at 2523). In setting out this principle, the Court in Schriro relied upon Bousley v. United States, which, in turn, relied upon Teague in explaining the "distinction between substance and procedure" as far as new rules of constitutional law are concerned. *See* 523 U.S. 614, 620-621, 118 S. Ct. 1604, 1610 (1998) (citing Teague, 489 U.S. at 311, 109 S. Ct. at 1075). The upshot of this is that the key principle relied on by the Court in Welch in holding that Johnson was a new substantive rule is ultimately rooted in Teague, which, as discussed above, is concerned exclusively with new rules of *constitutional* import. That is to say, if the rule is new, but not constitutional in nature, there is no need to resort to either of the Teague exceptions.

Juxtaposing the invalidation of the residual clause of the ACCA by Johnson with the change in Nevada law on first-degree murder[12] effected by Byford will help drive home the point that the former was premised on constitutional concerns not present in the latter. This, in turn, will help illustrate why Teague's retroactivity analysis has relevance only to the former. In Johnson, the United States Supreme Court considered whether the residual clause of the ACCA violated "the Constitution's prohibition of vague criminal laws." 576 U.S. at __, 135

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[11] The parties agreed that the second Teague exception was not applicable. Welch, __ U.S. at __, 136 S. Ct. at 1264.

[12] Specially, where the first-degree murder is premised on a theory of willfulness, deliberation, and premeditation. NRS 200.030(1)(a).

S. Ct. at 2555. The "residual clause" is part of the ACCA's definition of the term "violent felony":

> the term 'violent felony' means any crime punishable by imprisonment for a term exceeding one year . . . that—
>
> (i) has as an element the use, attempted use, or threatened use of physical force against the person of another; or
>
> (ii) is burglary, arson, or extortion, involves use of explosives, *or otherwise involves conduct that presents a serious potential risk of physical injury to another*;

18 U.S.C. § 924(e)(2)(B) (emphasis added). It is the italicized portion in clause (ii) of § 924(e)(2)(B) that came to be known as the "residual clause." Johnson, 576 U.S. at __, 135 S. Ct. at 2556. Pursuant to the ACCA, a felon who possesses a firearm after three or more convictions for a "violent felony" (defined above) is subject to a minimum term of imprisonment of 15 years to a maximum term of life. § 924(e)(1); Johnson, 576 U.S. at __, 135 S. Ct. at 2556. Thus, a conviction for a felony that "involves conduct that presents a serious potential risk of physical injury"—i.e., a felony that fell under the residual clause—could very well have made the difference between serving a maximum of 10 years in prison versus a maximum of life in prison. *See* Johnson, 576 U.S. at __, 135 S. Ct. at 2555 ("In general, the law punishes violation of this ban by up to 10 years' imprisonment. [ ] But if the violator has three or more earlier convictions for . . . a 'violent felony,' the [ACCA] increases his prison term to a minimum of 15 years and a maximum of life." (internal citation omitted)).

To understand the issue that arose with the residual clause, it helps to understand the context in which it was applied. *See* Welch, __ U.S. at __, 136 S. Ct. at 1262 ("The vagueness of the residual clause rests in large part on its operation under the categorical approach."). The United States Supreme Court employs what is known as the categorical approach in deciding whether an offense qualifies as a violent felony under § 924(e)(2)(B). Id. at __, 136 S. Ct. at 1262 (citing Johnson, 576 U.S. at __, 135 S. Ct. at 2557). Under the categorical approach, "a court assesses whether a crime qualifies as a violent felony 'in terms of how the law defines the offense and not in terms of how an individual offender might have committed it on a

particular occasion.' " Johnson, 576 U.S. at __, 135 S. Ct. at 2557 (quoting Begay v. United States, 553 U.S. 137, 141, 128 S. Ct. 1581, 1584 (2008)). The issue with the residual clause was that it required "a court to picture the kind of conduct that the crime involves in 'the ordinary case,' and to judge whether that abstraction presents a serious potential risk of physical injury." Id. (quoting James v. United States, 550 U.S. 192, 208, 127 S. Ct. 1586, 1597 (2007)).

The Court in Johnson found that "[t]wo features of the residual clause conspire[d] to make it unconstitutionally vague." Id. First, that the residual clause left "grave uncertainty about how to estimate the risk posed by a crime"; and second, that it left "uncertainty about how much risk it takes for a crime to qualify as a violent felony." Id. at __, 135 S. Ct. at 2557-58. Because of these uncertainties, the Court in Johnson explained that "[i]nvoking so shapeless a provision to condemn someone to prison for 15 years to life does not comport with the Constitution's guarantee of due process." Id. at __, 135 S. Ct. at 2560. Accordingly, "[t]he Johnson Court held the residual clause unconstitutional under the void-for-vagueness doctrine, a doctrine that is mandated by the Due Process Clauses of the *Fifth Amendment* (with respect to the Federal Government) and the *Fourteenth Amendment* (with respect to the States)." Welch, __ U.S. __, 136 S. Ct. at 1261-62 (emphasis added).

Unlike the invalidation of the residual clause of the ACCA on constitutional grounds, the change in the law on first-degree murder effected by Byford implicated no constitutional concerns. The Nevada Supreme Court in Nika explained in very clear terms that its "decision in Byford to change Nevada law and distinguish between 'willfulness,' 'premeditation,' and 'deliberation' was a matter of interpreting a state statute, *not a matter of constitutional law*." 124 Nev. at 1288, 198 P.3d at 850 (emphasis added). To reinforce this point, the Court in Nika noted how other jurisdictions "differ in their treatment of the terms 'willful,' 'premeditated,' and 'deliberate' for first-degree murder." Id.; *see* Id. at 1288-89, 198 P.3d at 850-51 ("As explained earlier, several jurisdictions treat these terms as synonymous while others, for example California and Tennessee, ascribe distinct meanings to these words. These different decisions demonstrate that the meaning ascribed to these words is not a matter of constitutional

law.").

Conflating the change effected by Johnson with that effected by Byford ignores a fundamental legal distinction between the two. Because the residual clause was found unconstitutionally void for vagueness, defendants whose sentences were increased on the basis of this clause were sentenced on the basis of an unconstitutional provision and, thus, were unconstitutionally sentenced. Such a sentence is, as the Court in Montgomery would put it, "not just erroneous but contrary to law and, as a result, void." *See* __ U.S. at __, 136 S. Ct. at 731 (citing Ex parte Siebold, 100 U.S. 371, 375, 25 L. Ed. 717, 719 (1880)). Not so with the change effected by Byford. At no point has Nevada's law on first-degree murder been found unconstitutional. Defendants who were convicted of first-degree murder under NRS 200.030(1)(a) prior to Byford were nonetheless convicted under a constitutionally valid statute and, thus, were lawfully convicted. *See* Nika, 124 Nev. at 1287, 198 P.3d at 850 (explaining that "the Kazalyn instruction correctly reflected Nevada law before Byford").

It was the constitutional rights that underlay Johnson's invalidation of the residual clause that made it a "substantive rule of constitutional law." *See* Montgomery, __ U.S. at __, 136 S. Ct. at 729. And as a "new" substantive rule of constitutional law, it fell within the first of the two exceptions to Teague's general rule of nonretroactivity. Because *no* constitutional rights underlay the Nevada Supreme Court's change in Nevada's law on first-degree murder, the new rule announced in Byford does not fall within Teague's "substantive rule" exception. The constitutional underpinnings of Johnson's invalidation of the residual clause and the legal ramifications stemming from this (i.e., that those whose sentences were increased pursuant to an *unconstitutional* provision were, in effect, *unconstitutionally* sentenced) were key to Welch's holding that the change effected by Johnson is retroactive under the Teague framework.

Petitioner's reliance on Welch, however, went beyond the Court's holding and *ratio decidendi*. In his exposition of Welch, Petitioner went on to describe the Court's treatment of the arguments raised by *Amicus*. *See* Petition at 17-18; Welch, __ U.S. at __, 136 S. Ct. at 1265-68. Among the arguments raised by *Amicus* were (1) that the Court should adopt a

different understanding of the Teague framework, "apply[ing] that framework by asking whether the constitutional right underlying the new rule is substantive or procedural"; (2) that a rule is only substantive if it limits Congress' power to legislate; and (3) that only "statutory construction cases are substantive because they define what Congress always intended the law to mean" as opposed to cases invalidating statutes (or parts thereof). Welch, __ U.S. at __, 136 S. Ct. at 1265-68. It was in addressing this third argument that the Court set out the "test" for determining when a rule is substantive that Petitioner's argument hinges on:

> Her argument is that statutory construction cases are substantive because they define what Congress always intended the law to mean—unlike Johnson, which struck down the residual clause regardless of Congress' intent.
>
> That argument is not persuasive. Neither Bousley nor any other case from this Court treats statutory interpretation cases as a special class of decisions that are substantive because they implement the intent of Congress. Instead, decisions that interpret a statute are substantive if and when they meet the normal criteria for a substantive rule: when they 'alte[r] the range of conduct or the class of persons that the law punishes.'

Id. at __, 136 S. Ct. at 1267 (quoting Schriro, 542 U.S. at 353, 124 S. Ct. at 2523). On the basis of this language, Petitioner came to the following conclusion:

> What is critically important, and new, about Welch is that it explains, for the very first time, that the *only* test for determining whether a decision that interprets the meaning of a statute is substantive, and must apply retroactively to all cases, is whether the new interpretation meets the criteria for a substantive rule, namely whether it alters the range of conduct or the class of persons that the law punishes. Because this aspect of Teague is now a matter of constitutional law, state courts are required to apply this rule from Welch.

Petition at 19 (emphasis in original).

Petitioner, however, failed to grasp that that this "test" he relied so heavily on is nothing more than judicial dictum. *Judicial Dictum*, Black's Law Dictionary 519 (9th Ed. 2009) (defining "judicial dictum" as "[a] opinion by a court on a question that is directly involved, briefed, and argued by counsel, and even passed on by the court, but that is not essential to the decision"). This "test" set out by the Court was in response to an argument made by *Amicus* and was not essential to Welch's holding regarding Johnson's retroactivity. As judicial dictum,

this "test" is not binding on Nevada courts as Petitioner argued. *See* Black v. Colvin, 142 F. Supp. 3d 390, 395 (E.D. Pa. 2015) ("Lower courts are not bound by dicta." (citing United States v. Warren, 338 F.3d 258, 265 (3d Cir. 2003)))

Interestingly, though, in setting out this test, the Court quoted verbatim from the very portion of its decision in Schriro that has been cited above, *see supra* at 15, for the proposition that the key principle relied on by the Welch Court—in holding that Johnson was a new substantive rule—is ultimately rooted in Teague, which, again, is concerned exclusively with new rules of constitutional import. Thus, to the extent the "test" relied on by Petitioner is grounded on this text from Schriro, Petitioner took it out of context by ignoring the fact that this statement in Schriro was based on Bousley's discussion of the substance/procedure distinction respecting new rules of constitutional law, which was, in turn, premised largely on Teague. See Bousley, 523 U.S. at 620-621, 118 S. Ct. at 1610 (citing Teague, 489 U.S. at 311, 109 S. Ct. at 1075). But, to the extent that this "test" is unmoored from the constitutional underpinnings of Teague's retroactivity analysis, it is, after all, nothing more than dictum. Either way, Petitioner's reliance on this language from Welch was misguided.

Because neither Montgomery nor Welch alter Teague's retroactivity analysis, the Nevada Supreme Court's decision in Colwell, which adopted Teague's framework, remains valid and, thus, controlling in this matter. And as reaffirmed by the Nevada Supreme Court in Nika, Byford has no retroactive application on collateral review to convictions, like Petitioner's, that became final before the new rule was announced. 124 Nev. at 1287-89, 198 P.3d at 850-51. Consequently, Petitioner's reliance on Montgomery and Welch to meet NRS 34.726(1)(a)'s criterion fails.

1. Petitioner Failed To Establish That Dismissal Of The Petition As Untimely Would Have Unduly Prejudiced Him.

Turning now to NRS 34.726(1)'s second prong—i.e., undue prejudice—necessary to establish good cause, this Court finds that Petitioner has failed to establish that he was unduly prejudiced by the use of the Kazalyn instruction. To meet NRS 34.726(1)(b)'s criterion, "a

petitioner must show that errors in the proceedings underlying the judgment worked to the petitioner's actual and substantial disadvantage." State v. Huebler, 128 Nev.__, __, 275 P.3d 91, 95 (2012) (citing Hogan v. Warden, 109 Nev. 952, 959–60, 860 P.2d 710, 716 (1993)).

Here, Petitioner was unable to show that he was unduly prejudiced by the use of the Kazalyn instruction because there was overwhelming evidence of premeditation, deliberation, and willfulness. In its Order affirming the denial of Petitioner's first habeas petition, the Nevada Supreme Court considered Petitioner's challenge to the Kazalyn instruction given at trial—albeit, in context of a claim of ineffective assistance of counsel:

> Second, Ennis claimed that his appellate counsel was ineffective for failing to argue that the jury instruction concerning premeditation and deliberation impermissibly removed the distinction between first and second-degree murder. In Kazalyn v. State, this court approved a jury instruction regarding premeditation that is almost identical to the one given by the district court in the instant case. Subsequent to the resolution of Ennis' direct appeal, however, this court expressly disapproved of the Kazalyn instruction and set forth an alternative jury instruction for future use. Nevertheless, a conviction in which the Kazalyn instruction was given is not automatically overturned. This court reviews the case to determine if sufficient evidence was adduced at trial to establish premeditation and deliberation. Here, multiple witnesses testified that Ennis borrowed David Nix's saw-off shotgun and stated his intention to kill the victim. Therefore, sufficient evidence of premeditation *and deliberation* was presented at trial, such that an appeal of this issue did not have a reasonable likelihood of success.

Ennis v. State, Docket No. 43017 at *4-5 (Order of Affirmance, filed November 3, 2004) (footnotes omitted) (emphasis added). Thus, to the extent that the Nevada Supreme Court rejected Petitioner's challenge to the Kazalyn instruction on the merits, Petitioner's renewed challenge is barred under the doctrine of law of the case. *See* State v. Loveless, 62 Nev. 312, 317, 150 P.2d 1015, 1017 (1944) (quoting Wright v. Carson Water Co., 22 Nev. 304, 308, 39 P. 872, 873-74 (1895)) ("The decision (on the first appeal) is the law of the case, not only binding on the parties and their privies, but on the court below and on this court itself. A ruling of an appellate court upon a point distinctly made upon a previous appeal is, in all subsequent proceedings in the same case upon substantially the same facts, a final adjudication, from the

consequences of which the court cannot depart."). As explained by the Nevada Supreme Court in Hall v. State, 91 Nev. 314, 316, 535 P.2d 797, 799 (1975), "[t]he doctrine of the law of the case cannot be avoided by a more detailed and precisely focused argument subsequently made after reflection upon the previous proceedings." *See also* Pellegrini v. State, 117 Nev. 860, 879, 34 P.3d 519, 532 (2001) (citing McNelton v. State, 115 Nev. 396, 414-15, 990 P.2d 1263, 1275 (1999)) ("Under the law of the case doctrine, issues previously determined by this court on appeal may not be reargued as a basis for habeas relief."). And because the Nevada Supreme Court has already determined that Petitioner was not prejudiced by the use of the Kazalyn instruction, Petitioner necessarily failed to establish undue prejudice for purposes of overcoming the procedural bars applicable to his third habeas petition.

Petitioner counters by arguing that "[t]he evidence against Ennis was not so great that it precluded a verdict of second-degree murder." Petition at 21. The basis, in part, for this argument was that "the credibility of all the witnesses was questionable." Id.; *see* id. at 21-22. Petitioner raised a similar argument on direct appeal, complaining "that several of the state's witnesses fabricated their testimony, thereby suggesting that the jury's verdict was not based on credible or reliable evidence." In response, the Nevada Supreme Court explained the following:

> This case rested on the credibility of each of the witnesses, including Ennis. Despite the credibility issues raised by Ennis, the jurors chose to accept as true the testimony of the State's witnesses. We conclude that Ennis is inappropriately asking this court to reassess the weight of the evidence and pass on the credibility of the witnesses. See Lay, 110 Nev. at 1192, 886 P.2d at 450. Furthermore, we have reviewed the record in this case and conclude that substantial evidence exists to support the conviction of murder with the use of a deadly weapon.

Ennis v. State, Docket No. at 28322 at *3 (Order Dismissing Appeal, filed December 30, 1997). This Court likewise rejected Petitioner's attempt to have this Court "reassess the weight of the evidence and pass on the credibility of the witnesses." *See* Id.

Based on the foregoing, this Court found that the instant Petition is untimely pursuant to NRS 34.726(1) and that Petitioner failed to establish "good cause for delay." The United States Supreme Court's decisions in Montgomery and Welch did not provide a new legal basis

to satisfy NRS 34.726(1)(a)'s criterion that the delay not be the fault of the petitioner. And Petitioner also failed to establish NRS 34.726(1)(b)'s criterion inasmuch as he has failed to establish that he was unduly prejudiced by the use of the Kazalyn instruction. That being the case, this Court denies the Petition on the basis that it was procedurally barred under NRS 34.726(1).

B. The Petition Was Successive Under NRS 34.810(2), And Petitioner Failed To Establish Good Cause And Actual Prejudice.

NRS 34.810(2) requires the district court to dismiss "[a] second or successive petition if the judge or justice determines that it fails to allege new or different grounds for relief and that the prior determination was on the merits or, if new and different grounds are alleged, the judge or justice finds that the failure of the petitioner to assert those grounds in a prior petition constituted an abuse of the writ." And as with NRS 34.726(1), the procedural bar described in NRS 34.810(2) is mandatory. *See* Evans v. State, 117 Nev. 609, 622, 28 P.3d 498, 507 (2001) ("[A] court *must dismiss* a habeas petition if it presents claims that either were or could have been presented in an earlier proceeding, unless the court finds both cause for failing to present the claims earlier or for raising them again and actual prejudice to the petitioner." (emphasis added)).

As noted above, the instant Petition constitutes the second habeas petition that Petitioner has filed. Petitioner filed his first habeas petition on December 29, 1998. On March 11, 2004, the Court denied the petition on the merits and entered its Findings of Fact, Conclusions of Law and Order to that effect on April 5, 2004. While Petitioner's claim attacking the Kazalyn instruction has been raised once before,[13] this is the first time that he has attacked it on the basis of the United States Supreme Court's decision in Montgomery and Riley. To the extent that this claim constitutes a "new and different" ground for relief, this Court finds that Petitioner's failure to raise it in a prior petition constitutes an abuse of the writ. And while NRS 34.810(3) affords Petitioner the opportunity to overcome the procedural bar

[13] Petitioner attacked the Kazalyn instruction in his first habeas petition. As noted above, the Nevada Supreme Court rejected this argument. *See* Ennis, Docket No. 43017 at *4-5.

described in subsection (2), Petitioner failed to establish either good cause or actual prejudice for the very same reasons that he failed to establish good cause for delay under NRS 34.726(1). *See supra* at 3-23. That being the case, this Court denies the Petition on the basis that it is procedurally barred under NRS 34.810(2).

C. The State Specifically Pleaded Laches Under NRS 34.800(2) Because More Than 19 Years Have Elapsed Between The Nevada Supreme Court's Decision On Petitioner's Direct Appeal Of The Judgment Of Conviction And The Filing Of The Instant Petition.

NRS 34.800(2) creates a rebuttable presumption of prejudice to the State if "[a] period exceeding 5 years [elapses] between the filing of a judgment of conviction, an order imposing a sentence of imprisonment or a decision on direct appeal of a judgment of conviction and the filing of a petition challenging the validity of a judgment of conviction." The Nevada Supreme Court observed in Groesbeck v. Warden, 100 Nev. 259, 261, 679 P.2d 1268, 1269 (1984), how "petitions that are filed many years after conviction are an unreasonable burden on the criminal justice system" and that "[t]he necessity for a workable system dictates that there must exist a time when a criminal conviction is final." To invoke NRS 34.800(2)'s presumption of prejudice, the statute requires that the State specifically plead laches.

The State affirmatively pleaded laches in this case. In order to overcome the presumption of prejudice to the State, Petitioner had the heavy burden of proving a fundamental miscarriage of justice. *See* Little v. Warden, 117 Nev. 845, 853, 34 P.3d 540, 545 (2001). Based on Petitioner's representations and on what he filed with this Court, Petitioner failed to meet that burden. That being the case, this Court dismisses the Petition pursuant to NRS 34.800(2).

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ORDER

THEREFORE, IT IS HEREBY ORDERED that the Petition for Post-Conviction Relief shall be, and it is, hereby denied.

DATED this 16 day of October, 2017.

DISTRICT JUDGE

STEVEN B. WOLFSON
Clark County District Attorney
Nevada Bar #001565

BY
RYAN J. MACDONALD
Deputy District Attorney
Nevada Bar #012615

CERTIFICATE OF SERVICE

I certify that on the ~~2nd~~ 3rd day of October, 2017, I e-mailed a copy of the foregoing proposed Findings of Fact, Conclusions of Law, and Order to:

COURTNEY B. KIRSCHNER
Assistant Federal Public Defender
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BY R. Johnson (for)
C. GARCIA
~~Secretary~~ for the District Attorney's Office

JW/RJM/cg/L3

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EIGHTH JUDICIAL DISTRICT COURT

CLARK COUNTY

BRUCE MAYO ENNIS, Petitioner, v. TIMOTHY FILSON, et al., Respondents.	Case No. 92C110002 Dept. No. XVII Date of Hearing: 08/18/2017 Time of Hearing: 9:00 a.m. (Not a Death Penalty Case)

Opposition to State's Response to Petition for Writ of Habeas Corpus (Post-Conviction)

Petitioner, Bruce Mayo Ennis, by and through his attorney, Assistant Federal Public Defender C.B. Kirschner, hereby files this opposition to "State's Response to Petition for Writ of Habeas Corpus (Post-Conviction)." This opposition is based on the attached points and authorities as well as all other pleadings, documents, and exhibits on file.

POINTS AND AUTHORITIES

I. INTRODUCTION

In its Response to Ennis's post-conviction petition, the State has asked this Court to dismiss the petition as time-barred, second and successive, and barred by laches. The State make three main arguments for dismissal: (1) *Teague* only applies to constitutional rules and the rule set forth in *Byford v. State*, 116 Nev. 215, 994 P.2d 700 (2000), is not constitutional, but a matter of statutory interpretation; (2) the recent Supreme Court decisions in *Montgomery* and *Welch* did not alter Nevada's retroactivity rules; and (3) even if *Montgomery* changed the retroactivity rules, *Welch* is not new as it was restating a rule the Court had previously established in *Schriro v. Summerlin,* 542 U.S. 348 (2004). Response at 4-20. Respondents also argue that the petition is barred by laches. Response at 23.

These arguments have no merit and should be rejected. First, in *Welch*, the United States Supreme Court made abundantly clear that the substantive exception to *Teague* applies to interpretations of criminal statutes that narrow the conduct or the class of persons that the law punishes. Because *Montgomery* is a new rule of constitutional law that the state courts are required to apply, this Court is required to apply the substantive exception in the manner that the Supreme Court has delineated. Second, for similar reasons *Montgomery* and *Welch* clearly alter the retroactivity rules in Nevada. The Nevada Supreme Court indicated in *Byford* that a change in law which narrows the interpretation of a criminal statute does not have retroactivity implications. *Welch*, in particular, contradicts this conclusion. Under *Montgomery* and *Welch*, state courts must now retroactively apply a change in law that meets the requirements of the substantive exception. Third, *Welch* establishes a new rule that provides the basis to file this petition. The Supreme Court did not explain the breadth of the new *Montgomery* rule and how that new rule applies to

this case until its decision in *Welch*. Put simply, it was not clear that Petitioner was entitled to relief until *Welch* was decided.

Finally, the petition is not barred by laches. As a constitutional matter and as a matter of equity, laches cannot, and should not, bar the petition. *Montgomery* and *Welch* created a new rule of constitutional law that the state courts must apply. The decision in *Montgomery* showed that there is no temporal limit on how far back the retroactive effect of a new rule must apply. Further, as a matter of equity, the discretionary laches bar should not be imposed. Despite a previous attempt, Petitioner was unable to obtain relief on this claim prior to *Montgomery* and *Welch*. There is no evidence that Petitioner inappropriately delayed this case. To the contrary, Petitioner is timely raising this now available claim.

Accordingly, the State's request in its Response to dismiss the petition should be denied. This Court should address the merits of the petition.

II. ARGUMENT

A. The Substantive Exception to *Teague* Applies to Interpretations of Criminal Statutes That are Substantive.

Respondents argue that the *Teague* substantive exception only applies to new constitutional rules. Response at 7-20. According to Respondents, because the Nevada Supreme Court indicated in *Nika v. State*, 122 Nev. 1269, 1288, 198 P.3d 839, 850 (2008), that the rule set forth in *Byford* is not constitutional, but a matter of statutory interpretation, it does not fall under *Teague*. *Id.*

This argument is no longer sustainable in light of *Welch*. In that decision, the Court made abundantly clear that it has applied the *Teague* substantive exception in statutory interpretation cases. *Welch v. United States*, 136 S. Ct. 1257, 1267 (2016) (discussing its application of the substantive exception in *Bousley v. United States*, 523 U.S. 614 (1998)).

More specifically, the Court in *Welch* explained precisely how a statutory interpretation decision like *Bousley* fits under the substantive exception of *Teague*. First, it confirmed that its application of the substantive exception to *Teague* did include statutory interpretation cases like *Bousley*. It stated that, in *Bousley*, the Court was determining "what retroactive effect" should be given to its prior decision in *Bailey v. United States*, 516 U.S. 137 (1995), which had narrowed the meaning of the term "use" of a firearm in relation to a drug crime under 28 U.S.C. § 924(c). *Bousley*, 523 U.S. at 620. The Court stated in *Welch* that it "had no difficulty concluding [in *Bousley*] that *Bailey* was substantive, as it was a decision 'holding that a substantive federal criminal statute does not reach certain conduct.'" *Welch*, 136 S. Ct. at 1267.

The Court then made clear in *Welch* that the *Bousley* decision demonstrates how the *Teague* substantive exception should be applied. *Id.* It stated: "*Bousley* thus contradicts the contention that the *Teague* inquiry turns only on whether the decision at issue holds that Congress lacks some substantive power." *Id.* More important, the Court emphatically concluded that statutory interpretation cases are treated like any other application of the substantive exception to *Teague*:

> Neither *Bousley* nor any other case from this Court treats statutory interpretation cases as a special class of decisions that are substantive because they implement the intent of Congress. Instead, decisions that interpret a statute are substantive if and when they meet the normal criteria for a substantive rule: when they "alter the range of conduct or the class of persons that the law punishes." *Schriro* [v. *Summerlin*], [542 U.S. 348] at 353 [2004].

Id.

As can be seen, the United States Supreme Court in *Welch* has left no doubt that the substantive exception to *Teague* applies to statutory interpretation cases. *See Schriro*, 542 U.S. at 351-52 ("New substantive rules generally apply retroactively. This includes decisions that narrow the scope of a criminal statute by interpreting its

terms . . . ."). Indeed, the Court in *Welch* used those statutory interpretation cases to define the contours of the substantive exception. *Welch*, 136 U.S. at 1266, 1267. "'States may not disregard a controlling constitutional command in their own courts.'" *Montgomery v. Louisiana*, 136 S. Ct. 718, 727 (2016) (quoting *Martin v. Hunter's Lessee*, 1 Wheat 304, 340-41 (1816)). The Supreme Court has now held that the substantive exception applies to state courts as a matter of constitutional law. The Court has applied that substantive exception to statutory interpretation cases that narrow the definition of a criminal statute. The state courts are now required to apply the substantive exception in the manner that the United States Supreme Court has indicated. *Byford* falls under the substantive exception as it narrowed the interpretation of a criminal statute. That is no different than what the Supreme Court described as how it applied the substantive exception in *Bousley*.[1] It is the end of the inquiry here.

There is an obvious reason why the substantive exception would apply to cases that interpret a criminal statute. Based on the Supreme Court's analysis of *Bousley* in *Welch*, it is clear that a statutory interpretation issue that narrows the meaning of a criminal statute not only meets the substantive exception, but raises a separate due process concern. The language used in *Welch* to describe what *Bousley* was determining—that the new interpretation of the statute "does not reach certain conduct"—is nearly identical to the Court's due process analysis in cases such as *Fiore*

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[1] To note, the Nevada Supreme Court has suggested in dicta on one occasion that a substantive change in law that narrowed the definition of a statute would have retroactive effect. *Mitchell v. State*, 122 Nev. 1269, 1277, n.25, 149 P.3d 33, 38 n.25 (2006). However, as discussed in more detail below, the Nevada Supreme Court has otherwise and repeatedly held that a change in the interpretation of a statute does not have retroactive implications. *Nika v. State*, 122 Nev. 1269, 1288, 198 P.3d 839, 850 (2008) ("We affirm . . . and maintain our course respecting retroactivity analysis—if a rule is new but not a constitutional rule, it has no retroactive application to convictions that are final at the time of the change in law. . . . [T]he interpretation and definition of the elements of a state criminal statute are purely a matter of state law. . . .").

v. White, 531 U.S. 225 (2001), which also concerned a narrowing statutory interpretation. As the Court stated in *Fiore*, the due process question is "whether Pennsylvania can, consistently with the Federal Due Process Clause, convict Fiore for *conduct that its criminal statute, as properly interpreted, does not prohibit*." *Id.* at 228 (emphasis added). As the Nevada Supreme Court acknowledged in *Nika*, *Bunkley* established that a narrowing change in law, just like the clarification at issue in *Fiore*, raises due process concerns. Thus, no matter how it is described, a narrowing interpretation implicates due process concerns. And now the Supreme Court has made clear that the same reason why the narrowing interpretation implicates due process establishes why it must be applied retroactively.

Respondents argue that the Court's discussion of how the substantive exception applies in statutory interpretation cases was dicta, pointing out that the Court was merely responding to an argument raised by amicus curiae. Response at 18-19. This argument is unpersuasive. While it is true that this analysis was done in response to an amicus argument, that did not render it dicta. Amicus was specifically appointed in *Welch* to raise arguments in support of the judgment of the lower court, as both parties in the Supreme Court agreed on the retroactivity question. *Welch*, 136 S.Ct. at 1263. Thus, in addressing the amicus argument the Court was engaging in a necessary and essential analysis related directly to the ultimate question of whether or not the lower court's decision should be affirmed.[2]

To be sure, the rules at issue in *Montgomery* and *Welch* did not directly concern a statutory interpretation question. But that does not mean those cases do not apply

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[2] Even assuming *arguendo* it was dicta, a lower court should "afford considered dicta from the Supreme Court . . . a weight that is greater than ordinary judicial dicta as prophecy of what the court might hold." *Nettles v. Grounds*, 830 F.3d 922, 930-31 (9th Cir. 2016) (internal quotations omitted). What is also important here is that there is nothing inconsistent with between this analysis in *Welch* and any of the Court's prior decisions. *Welch* simply answers a retroactively question left open in *Fiore* and *Bunkley*, namely whether a narrowing change in the interpretation of a statute can apply retroactively. *See Fiore v. White* 531 U.S. 225, 226 (2001).

here. In the first instance, the new rule from *Montgomery*—that the substantive exception to *Teague* applies to the state courts as a matter of due process—did not depend on the type of rule that the Court was applying in that case. More important, as shown above, *Welch* specifically explained how the *Teague* substantive exception applies to statutory interpretation cases as part of a central discussion in its opinion as to why the lower court's decision could not be sustained. The situation here falls squarely within that analysis.

Accordingly, the Supreme Court has made absolutely clear that the substantive exception applies to a statutory interpretation that narrows the meaning of a criminal statute.

B. *Montgomery* and *Welch* Require a Broader Retroactivity Rule than the One That Previously Existed in Nevada.

Respondents argue that *Montgomery* and *Welch* do not alter Nevada retroactivity rules as they do not require state courts to consider whether a new statutory interpretation applies retroactively. Response at 11-13. Respondents also point out that Nevada has established retroactivity rules that are broader than those set forth in *Teague*. *Id.* at 8-9.

Once again, Respondents' argument is no longer viable after *Montgomery* and *Welch*. *Montgomery* requires, as a matter of due process, that the state courts apply the substantive exception to *Teague* as it has been applied by the Supreme Court. *Welch* makes clear that application of the substantive exception includes an interpretation of a criminal statute that changed its meaning by narrowing it. The question here is simple—did the Nevada state courts apply the substantive exception to these types of statutory interpretation issues? If yes, then the law hasn't changed in Nevada. If no, then it has.

The answer here is obvious. The Nevada Supreme Court did not apply the substantive exception to a statutory interpretation case. The court specifically stated

that in *Nika*: "We affirm our decisions in *Clem* [*v. State*, 119 Nev. 615, 81 P.3d 521 (2003)] and *Cowell* [v. *State*, 118 Nev. 807, 59 P.3d 463 (2002),][3] and maintain our course respecting retroactivity analysis—if a rule is new but not a constitutional rule, it has no retroactive application to convictions that are final at the time of the change in law. . . . [T]he interpretation and definition of the elements of a state criminal statute are purely a matter of state law. . . ." *Nika*, 122 Nev. at 1288, 198 P.3d at 850.

That analysis is now contrary to *Welch*. *Welch* makes clear that the substantive exception applies to statutory interpretation cases. There is only one relevant retroactivity factor now. As the Court stated in *Welch*, "decisions that interpret a statute are substantive if and when they meet the normal criteria for a substantive rule: when they 'alter the range of conduct or the class of persons that the law punishes.'" *Welch*, 136 S.Ct. at 1267 (quoting *Schriro*, 542 U.S. at 353). In *Nika*, the Nevada Supreme Court refused to even consider this question for a change in law. It stated that *Byford* raised no retroactivity concerns. But *Montgomery* and *Welch* establish that the state courts must address this retroactivity question now.

That the Nevada Supreme Court established retroactivity rules broader than *Teague* is irrelevant here. The only relevant question is whether those retroactivity rules allowed for the retroactive application of a change in law that narrowed the meaning of statute. *Nika* definitively established that Nevada's retroactivity rules did not allow for this. Simply because Nevada's retroactivity rules were broader in other ways than *Teague* does not mean that *Montgomery* and *Welch* could have no

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[3] The State criticizes Petitioner for failing to discuss *Clem* and *Colwell*. But it is not clear why a discussion of the general retroactivity rules discussed in those cases is necessary here. The only relevant question is whether the Nevada Supreme Court's application of its retroactivity rules in *Nika* is now contrary to *Welch* and *Montgomery*. In this regard, Petitioner more than sufficiently discussed in his petition the relevant parts of *Nika*. That was all that was necessary to state his claim and allege grounds for good cause.

effect on the scope of Nevada's retroactivity rules. They simply require those rules to be broader in a way that the Nevada Supreme Court had previously refused to implement.

Accordingly, *Montgomery* and *Welch* establish a change in constitutional law that provides good cause for Petitioner to raise this claim.

C. *Welch* Is New Because It Established the Applicable Retroactivity Analysis with Respect to Statutory Interpretation Cases.

The State argues that, even if *Montgomery* stated a new constitutional rule, *Welch* did not add anything new. Response at 19. According to Respondents, the Court relied in *Welch* upon its previous decision in *Schriro* for its conclusion that a decision interpreting a statute applies retroactively so long as it meets the requirements of the substantive exception. *Id.*

This argument has no merit. While it is true that *Montgomery* created the new constitutional rule that provides the ground for cause, the Supreme Court did not explain the breadth of that new rule and how that new rule applies to this case until its decision in *Welch*. As shown above, *Welch* not only made clear beyond any doubt that the substantive exception to *Teague* applied to statutory interpretation cases, but it also explained *how to apply* the exception to statutory interpretation cases.

Schriro simply does not do what *Welch* does. In *Schriro* the Supreme Court concluded that its prior decision in *Ring v. Arizona*, did not apply retroactively in state court because it was a procedural rule. 542 U.S. at 353. At the beginning of its discussion of the *Teague* rules, the Court noted that "decisions that narrow the scope of a criminal statute by interpreting its terms," fall under the substantive exception, citing *Bousley*. *Schriro*, 542 U.S. at 351-52. The true import of *Schriro* was that it appeared to broaden the meaning of the substantive exception. It was the first time the Court defined it in the following way: "A rule is substantive rather than

procedural if it alters the range of conduct or the class of persons that the law punishes." *Id.* at 353.

But there is nothing in *Schriro* that indicated *how* this exception should be applied in statutory interpretation cases. The Supreme Court has never previously stated anything similar to what it stated in *Welch* as to the exact standard and analysis that should be used when determining whether a change in law narrowing the meaning of a criminal statute needs to apply retroactively.

This is absolutely crucial here. Prior to *Welch*, the Nevada Supreme Court limited the retroactivity analysis for statutory interpretation cases to the clarification/change dichotomy. If there was a narrowing clarification, then a statutory interpretation case applied retroactively. *Nika*, 122 Nev. at 1287, 198 P.3d at 850; *Colwell*, 119 Nev. at 623-24, 81 P.3d at 527. If there was a narrowing change in law, then a statutory interpretation case did not apply retroactively. It only applied a change in law to those cases that had not yet become final. *Nika*, 122 Nev. at 1287, 198 P.3d at 850. *Schriro* only cited *Bousley*, which was a clarification case. It would be reasonable for a state court to believe that *Schriro* had not altered that clarification/change dichotomy. That is precisely how the Nevada Supreme Court viewed the import of *Bousley*; it was simply a clarification case. *Clem*, 119 Nev. at 531, 81 P.3d at 629. Even after *Schriro* the Nevada Supreme Court in *Nika* continued to apply the clarification/change dichotomy as the only relevant retroactivity analysis for statutory interpretation cases. *Nika*, 122 Nev. at 1287-88, 198 P.3d at 850.

But now *Welch* has rendered that dichotomy obsolete, at least with respect to retroactivity analysis. The only factor that matters now is whether the statutory interpretation case meets the normal criteria for a substantive rule, namely, whether it altered the range of conduct or the class of persons that the law punishes. Petitioner could not successfully raise this claim until *Welch* was decided.

Respondents read a great deal into *Welch*'s citation of *Schriro*. But it appears that the Court was doing nothing more than quoting language from *Schriro*. *Schriro* itself was not determining whether a statutory interpretation applied retroactively. It was deciding whether a particular aspect of the right to a jury trial applied retroactively. Unlike in *Welch*, *Schriro* did not discuss how to apply *Teague*'s substantive exception to statutory interpretation cases; the Court only stated that it did apply. Put simply, *Schriro* plus *Montgomery* does not provide Petitioner with a claim here. Those two cases together, without more, do not do enough to undermine *Nika*. It is *Montgomery* plus *Welch* that provides Petitioner the basis on which to argue that due process now requires that a change in law that narrows the meaning of a criminal statute must apply retroactively.

Accordingly, it is *Montgomery* plus *Welch* that provides Petitioner the basis for his claim.

D. Petitioner has demonstrated prejudice.

Respondents argue the petition should be denied because Petitioner failed to demonstrate prejudice. Response at 20-22. Respondents argue there was overwhelming evidence of guilt, as found by the Nevada Supreme Court and which cannot be challenged due to the law of the case doctrine. *Id.* at 21.

First, as explained in the Petition, law of the case does not bar this Court from addressing this claim due to the intervening change in law. Under the law of the case doctrine, "the law or ruling of a first appeal must be followed in all subsequent proceedings." *Hsu v. County of Clark*, 123 Nev. 625, 173 P.3d 724, 728 (2007). However, the Nevada Supreme Court has recognized that equitable considerations justify a departure from this doctrine. *Id.* at 726. That court has noted three exceptions to the doctrine: (1) subsequent proceedings produce substantially new or different evidence; (2) there has been an intervening change in controlling law; or (3) the prior decision was clearly erroneous and would result in manifest injustice if

enforced. *Id.* at 729. Here, *Welch* and *Montgomery* represent an intervening change in controlling law. These cases establish new rules that control the control both the state courts as well as the outcome here. Thus, law of the case does not bar consideration of the issue here.

Second, law of case does not apply because the current issue is different from the issue raised in prior post-conviction proceedings. The previous issue decided by the Nevada Supreme Court concerned the alleged ineffectiveness of appellate counsel. (Order of Affirmance, 11/3/04, p. 4.) The current issue is whether *Byford* was a substantive change in the law such that it has be applied retroactively under *Welch* and *Montgomery*, an issue not decided by the Nevada Supreme Court.

> In order for the law-of-the-case doctrine to apply, the appellate court must actually address and decide the issue explicitly or by necessary implication. However, the doctrine does not bar a district court from hearing and adjudicating issues not previously decided, and does not apply if the issues presented in a subsequent appeal differ from those presented in a previous appeal.

Dictor v. Creative Management Services, LLC, 126 Nev. 41, 44-45, 223 P.3d 332, 334 (2010) (internal citations omitted). The issues here are related, but distinct, and therefore the law of the case doctrine is not controlling.

Third, the question here is whether "there is a reasonable likelihood that the jury has applied the challenged instruction in a way that violates the Constitution." *Middleton v. McNeil*, 541 U.S. 433, 437 (2004) (*citing Estelle v. McGuire*, 502 U.S. 62, 72 (1991)). The question is not whether "an appeal of this issue" had "a reasonable likelihood of success," which was the question addressed by the Nevada Supreme Court. (Order of Affirmance, 11/3/04, p. 5.) Here, there is a reasonable likelihood that the jury applied the instruction in an unconstitutional manner because, as recognized in *Byford*, the instruction blurred the distinction between first and second degree murder. The jury was not required to find the separate and distinct element

of deliberation. Indeed, the evidence of deliberation was severely lacking. The evidence pointed strongly to a heat of passion killing, where Ennis and the victim, his stepfather, got into an argument which resulted in the victim pulling a knife and Ennis shooting in response.

Harry (Hank) Vaughan, saw Ennis and his stepfather arguing on the day in question. He testified that it looked like a fist fight was about to break out and he described the veins bulging on the victim's neck, a sign of anger. (TT 11/29/95, p. 165-241). Ennis testified that he and his stepfather argued frequently because his stepfather did not want him, Ennis, to keep riding his motorcycle. Ennis had been in two, serious accidents earlier that same year and had become addicted to pain medications. Ennis testified that on the date in question, he was fixing his bike in Vaughan's garage when he once again got into an argument with his stepfather about it. Vaughan had to step in between the two of them and told Ennis to leave. Ennis came back shortly after to retrieve his bike and the argument picked up where it left off with his stepfather. Ennis testified that his stepfather, who had a temper, pulled out a switchblade knife and charged at Ennis with it. Ennis, who had limited mobility due to his previous injuries, grabbed the shotgun to defend himself and fired it once in his stepfather's direction. Ennis was stunned to discover that he had shot and killed his stepfather. He grabbed the knife and the shotgun and fled in the victim's car. (TT 12/4/95, p. 910-1037.)

Much of Ennis's testimony was corroborated by other witnesses. Betty Forisha, Ennis's mother and wife of the victim, testified that the victim did own a switchblade. (TT 11/30/95, p. 532-572a.) Officer Al Woodruff, who had contact with Ennis shortly after the shooting, recovered the switchblade from the vehicle and confirmed that Ennis said the knife was his father's. (TT 12/1/95, p. 780-791.) A hitchhiker that Ennis picked up, Janet Page, also saw Officer Woodruff recover the switchblade. (TT 11/29/05, p. 242-304.)

Several witnesses who had contact with Ennis shortly after the shooting heard him say that his stepfather pulled a knife on him and that Ennis shot his stepfather in self-defense, including Janet Page (TT 11/29/05, p. 242-304); Tanya Leahy (TT 12/1/95, p. 635-690); and Melissa Sisney, Ennis's sister (TT 12/1/95, p. 842-874). Numerous other witnesses confirmed that Ennis and the victim both had tempers, and that the victim could be violent when angry: Vaughan saw Ennis and the victim arguing prior to the shooting and described the veins bulging in the victim's neck because he was so angry (TT 11/29/95, 165-241); David Nix testified that Ennis and his stepfather often argued (TT 11/30/95, p. 441-514); Betty Forisha testified that the victim had a drinking problem and could be violent whether he was drinking or not, would "go after" someone who made him angry, and was already agitated when he left home on the day of the shooting (TT 11/30/95, p. 532-572a; 12/1/95, p. 572-590). Melissa Sisney also testified that both Ennis and the victim had tempers, but the victim started a lot of the arguments, had a drinking problem, and could be mean (TT 12/1/95, p. 842-874). If the jury had been properly instructed, there is a reasonable likelihood they would not have found proof beyond a reasonable doubt as to the element of deliberation and they would have convicted Ennis of second-degree murder instead of first-degree murder. Consequently, Petitioner was prejudiced by the unlawful jury instruction.

E. The Petition Is Not Barred By Laches.

Respondents argue the petition is barred by laches. Response at 23-24. This argument should be rejected. As a constitutional matter and as a matter of equity, laches cannot, and should not, bar the petition. The state courts are now constitutionally required to apply a substantive change retroactively. That is the import of *Montgomery*. And the facts of *Montgomery* demonstrate the breadth and far-reaching application of this new constitutional rule. Put simply, there is no temporal limit on how far back a new substantive change must be applied.

The question in *Montgomery* was whether the Supreme Court's prior decision in *Miller v. Alabama*, 132 S. Ct. 2455 (2012), in which the Supreme Court held that a juvenile cannot be sentenced to life without parole absent consideration of the defendant's special circumstance as a juvenile, applied retroactively. *Montgomery*, 136 S.Ct. at 725. The petitioner in *Montgomery* received a life without parole sentence as a juvenile almost *50 years* prior to the decision in *Miller*. *Id.* at 726. After determining that *Miller* did apply retroactively, the Court held that "prisoners like Montgomery *must* be given the opportunity to show their crime did not reflect irreparable corruption; and, if it did not, their hope for some years of life outside prison walls must be restored." *Id.* at 736-37 (emphasis added).

As can be seen, the new rule from *Montgomery* has exceedingly broad implications. If a change in law is retroactive, a petitioner whose conviction has already become final, even if it has been final for 50 years, must be given the benefit of that new rule. That overcomes any allegation of lack of diligence or prejudice. These are simply not relevant factors in the retroactivity determination. The federal Constitution requires the rule be applied to a petitioner in Ennis's position.

Further, as a matter of equity, this Court should not impose the discretionary laches bar. The length of time that has passed in this case is not attributable to a delay from Ennis. Ennis previously attempted to raise this claim, but he was denied relief. In fact, Ennis was unable to obtain relief on this issue prior to *Montgomery* and *Welch*. The Nevada Supreme Court definitively held in *Nika* that petitioners whose convictions became final prior to *Byford* were not entitled to relief. The United States Supreme Court has now issued a new constitutional rule with direct application to Petitioner's case that was not previously available to him. The state courts are constitutionally required to apply this new rule to his case. The record indicates that Petitioner has not inappropriately delayed this case. The discretionary laches bar should not be imposed. *See State v. Powell*, 122 Nev. 751, 758-59, 138 P.3d

453, 458 (2006) (State was not entitled to relief under N.R.S. 34.800 because petitioner had not inappropriately delayed case). Petitioner therefore respectfully requests this Court grant his Petition.

Dated this 11th day of July, 2017.

Respectfully submitted,
RENE L. VALLADARES
Federal Public Defender

/s/ CB Kirschner
C.B. KIRSCHNER
Assistant Federal Public Defender

CERTIFICATE OF SERVICE

I hereby certify that on July 11, 2017, I electronically filed the foregoing with the Clerk of the Eighth Judicial District by using the Court's electronic filing system.

Participants in the case who are registered users in the electronic filing system will be served by the system and include: Ryan J. MacDonald, Ryan.MacDonald@clarckcountyda.com, motions@clarkcountyda.com.

I further certify that some of the participants in the case are not registered electronic filing system users. I have mailed the foregoing document by First-Class Mail, postage pre-paid, or have dispatched it to a third party commercial carrier for delivery within three calendar days, to the following person:

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An Employee of the Federal Public Defender, District of Nevada

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DISTRICT COURT
CLARK COUNTY, NEVADA

THE STATE OF NEVADA,

Plaintiff,

-vs-

BRUCE MAYO ENNIS,
#0280037

Defendant.

CASE NO: 92C110002

DEPT NO: XVII

STATE'S RESPONSE TO PETITION FOR WRIT OF HABEAS CORPUS (POST-CONVICTION)

DATE OF HEARING: MAY 30, 2017
TIME OF HEARING: 8:30 A.M.

Comes now, the State of Nevada, by STEVEN B. WOLFSON, Clark County District Attorney, through RYAN J. MACDONALD, Deputy District Attorney, and hereby submits the attached Points and Authorities in Response to Defendant's Petition for Writ of Habeas Corpus (Post-Conviction).

This Response is made and based upon all the papers and pleadings on file herein, the attached points and authorities in support hereof, and oral argument at the time of hearing, if deemed necessary by this Honorable Court.

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POINTS AND AUTHORITIES

STATEMENT OF THE CASE

On December 21, 1992, the State charged BRUCE MAYO ENNIS (hereinafter "Petitioner") by way of Information with Murder with Use of a Deadly Weapon, Robbery with Use of a Deadly Weapon, and Possession of Firearm by Ex-Felon. Petitioner's jury trial commenced on November 29, 1995, and on December 4, 1995, the jury returned a verdict finding Petitioner guilty of Murder of the First Degree with Use of a Deadly Weapon but not guilty of Robbery with Use of a Deadly Weapon.[1] On January 18, 1996, Petitioner pleaded guilty by way of a Guilty Plea Agreement to the charge of Possession of Firearm by Ex-Felon.

On that same day, Petitioner was adjudged guilty of both COUNT 1 (Murder of the First Degree with Use of a Deadly Weapon) and COUNT 3 (Possession of Firearm by Ex-Felon) and sentenced to the Nevada State Prison as follows: as to COUNT 1, Life without the possibility of parole plus a consecutive term of Life without the possibility of parole for the use of a deadly weapon; as to COUNT 3, 6 years, to run concurrent with COUNT 1. The Judgment of Conviction was entered on January 30, 1996. On December 30, 1997, the Nevada Supreme Court issued an Order dismissing Petitioner's appeal. Remittitur issued on January 21, 1998.

On December 29, 1998, Petitioner filed his first habeas petition. On March 11, 2004, the Court denied the petition and entered its Findings of Fact, Conclusions of Law and Order to that effect on April 5, 2004. On November 3, 2004, the Nevada Supreme Court issued an Order affirming the district court's denial of the first habeas petition. Remittitur issued on November 30, 2004.

On April 13, 2017, Petitioner filed the instant Petition for Writ of Habeas Corpus (Post-Conviction), which now constitutes his second habeas petition. The State responds as follows.

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[1] On the first day of trial, the Court granted Petitioner's Motion to Sever Count Three of the Instant Information. On that same day, the parties also agreed to waive the separate penalty hearing and stipulated to sentencing by the judge in the event the jury were to return a verdict of first-degree murder.

ARGUMENT

I. The Petition Is Procedurally Barred Under Both NRS 34.726(1) And NRS 34.810(2), And The State Specifically Pleads Laches Under NRS 34.800(2).

The instant Petition has been filed more than 19 years after the Nevada Supreme Court issued its remittitur on Petitioner's direct appeal from the Judgment of Conviction. Accordingly, it is untimely under NRS 34.726(1). In an attempt to establish good cause to excuse this untimeliness, Petitioner relies on the United States Supreme Court's decisions in *Montgomery v. Louisiana*, __ U.S. __, 136 S. Ct. 718 (2016), and *Welch v. United States*, __ U.S. __, 136 S. Ct. 1257 (2016). *Montgomery* and *Welch*, however, fail to serve as good cause necessary to overcome NRS 34.726(1)'s procedural bar. Moreover, because the instant Petition constitutes Petitioner's second habeas petition, it is successive under NRS 34.810(2). And for the same reasons that *Montgomery* and *Welch* fail to constitute good cause to overcome NRS 34.726(1)'s procedural bar, it likewise fails to constitute good cause sufficient to overcome NRS 34.810(2)'s procedural bar. Lastly, because more than 19 years have elapsed between the Nevada Supreme Court's decision on Petitioner's direct appeal of the Judgment of Conviction and the filing of the instant Petition, the State pleads laches pursuant to NRS 34.800(2) and seeks to avail itself of that statute's rebuttable presumption of prejudice.

A. The Petition Is Untimely Under NRS 34.726(1), And Petitioner Has Failed To Establish Good Cause For Delay.

Under NRS 34.726(1), "a petition that challenges the validity of a judgment or sentence must be filed within 1 year after entry of the judgment of conviction or, if an appeal has been taken from the judgment, within 1 year after the appellate court of competent jurisdiction . . . issues its remittitur," absent a showing of good cause for delay. In *State v. Eighth Judicial Dist. Court (Riker)*, the Nevada Supreme Court noted that "the statutory rules regarding procedural default are mandatory and cannot be ignored when properly raised by the State." 121 Nev. 225, 233, 112 P.3d 1070, 1075 (2005).

Here, the Judgment of Conviction in Petitioner's case was filed on January 30, 1998. Petitioner filed a Notice of Appeal, and on December 30, 1997, the Nevada Supreme Court

issued an Order dismissing Petitioner's appeal. Remittitur issued on January 21, 1998. Accordingly, Petitioner had until January 21, 1999, to file a timely Petition. The instant Petition, however, was filed on April 11, 2017—more than 18 years after the one-year deadline had expired. Such untimeliness can be excused if Petitioner can establish good cause for the delay. This, however, he has failed to do.

To show good cause for delay under NRS 34.726(1), a petitioner must demonstrate the following: (1) "[t]hat the delay is not the fault of the petitioner" and (2) that the petitioner will be "unduly prejudice[d]" if the petition is dismissed as untimely.

1. Petitioner Has Failed To Establish That The Delay Is Not His Fault.

To meet NRS 34.726(1)'s first requirement, "a petitioner must show that an impediment external to the defense prevented him or her from complying with the state procedural default rules." *Hathaway v. State*, 119 Nev. 248, 252, 71 P.3d 503, 506 (2003). "An impediment external to the defense may be demonstrated by a showing 'that the factual or legal basis for a claim was not reasonably available to counsel, or that some interference by officials, made compliance impracticable.' "*Id.* (quoting *Murray v. Carrier*, 477 U.S. 478, 488, 106 S. Ct. 2639 (1986)).

Petitioner attempts to meet this first requirement by arguing new case law. Specifically, he argues that *Montgomery* and *Welch* "represent a change in law that allows petitioner to obtain the benefit of *Byford*[2] on collateral review." Petition at 9. In essence, Petitioner avers that *Montgomery* and *Welch* establish a legal basis for a claim that was not previously available. Petitioner's reliance on *Montgomery* and *Welch* is misguided.

As noted by Petitioner, he received the following jury instruction on premeditation and deliberation:

> Premeditation is a design, a determination to kill, distinctly formed in the mind at any moment before or at the time of the killing.
>
> Premeditation need not be for a day, an hour or even a minute. It may be as instantaneous as successive thoughts of the mind. For if the jury believes from the evidence that the act constituting the killing has been preceded by and has been the result of

[2] *Byford v. State*, 116 Nev. 215, 235, 994 P.2d 700, 713 (2000), *cert. denied, Byford v. Nevada*, 531 U.S. 1016, 121 S. Ct. 576 (2000).

> premeditation, no matter how rapidly the premeditation is followed by the act constituting the killing, it is willful, deliberate and premeditated murder.

Instructions to the Jury, filed December 4, 1995, Instruction No. 8. This instruction is known as the *Kazalyn*[3] instruction.

The Nevada Supreme Court held in *Byford* that this *Kazalyn* instruction did "not do full justice to the [statutory] phrase 'willful, deliberate and premeditated.' " 116 Nev. at 235, 994 P.2d at 713. As explained by the Court in *Byford*, the *Kazalyn* instruction "underemphasized the element of deliberation," and "[b]y defining only premeditation and failing to provide deliberation with any independent definition, the *Kazalyn* instruction blur[red] the distinction between first- and second-degree murder." 116 Nev. at 234-35, 994 P.2d at 713. Therefore, in order to make it clear to the jury that "deliberation is a distinct element of *mens rea* for first-degree murder," the Court directed "the district courts to cease instructing juries that a killing resulting from premeditation is 'willful, deliberate, and premeditated murder.' "*Id.* at 235, 994 P.2d at 713. The Court then went on to provide a set of instructions to be used by the district courts "in cases where defendants are charged with first-degree murder based on willful, deliberate, and premeditated killing." *Id.* at 236-37, 994 P.2d at 713-15.

Seven years later, in *Polk v. Sandoval*, the United States Court of Appeals for the Ninth Circuit weighed in on the issue. 503 F.3d 903 (9th Cir. 2007). There, the Ninth Circuit held that the use of the *Kazalyn* instruction violated the Due Process Clause of the United States Constitution because the instruction "relieved the state of the burden of proof on whether the killing was deliberate as well as premeditated." *Id.* at 909. In *Polk*, the Ninth Circuit took issue with the Nevada Supreme Court's conclusion in cases decided in the wake of *Byford* that "giving the *Kazalyn* instruction in cases predating *Byford* did not constitute constitutional error."[4] *Id.* at 911. According to the Ninth Circuit, "the Nevada Supreme Court erred by conceiving of the *Kazalyn* instruction issue as purely a matter of state law" insofar as it "failed

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[3] *Kazalyn v. State*, 108 Nev. 67, 825 P.2d 578 (1992).

[4] *See, e.g., Garner v. State*, 6 P.3d 1013, 1025, 116 Nev. 770, 789 (2000), *overruled on other ground by Sharma v. State*, 118 Nev. 648, 56 P.3d 868 (2002).

to analyze its own observations from *Byford* under the proper lens of *Sandstrom, Franklin,* and *Winship* and thus ignored the law the Supreme Court clearly established in those decisions—that an instruction omitting an element of the crime and relieving the state of its burden of proof violates the federal Constitution." *Id.*

A little more than a year after *Polk* was decided, the Nevada Supreme Court addressed that decision in *Nika v. State*, 124 Nev. 1272, 1286, 198 P.3d 839, 849 (2008). In commenting on the Ninth Circuit's decision in *Polk*, the Court in *Nika* pointed out that "[t]he fundamental flaw . . . in *Polk*'s analysis is the underlying assumption that *Byford* merely reaffirmed a distinction between 'willfulness,' 'deliberation' and 'premeditation.'" *Id.* Rather than being simply a clarification of existing law, the Nevada Supreme Court in *Nika* took the "opportunity to reiterate that *Byford* announced *a change in state law*." *Id.* (emphasis added). In rejecting the Ninth Circuit's reasoning in *Polk*, the Nevada Supreme Court noted that "[u]ntil *Byford*, we had not required separate definitions for 'willfulness,' 'premeditation' and 'deliberation' when the jury was instructed on any one of those terms." *Id.* Indeed, *Nika* explicitly held that "the *Kazalyn* instruction correctly reflected Nevada law before *Byford*." *Id.* at 1287, 198 P.3d at 850.

The Court in *Nika* then went on to affirm its previous holding that *Byford* is not retroactive. 124 Nev. at 1287, 198 P.3d at 850 (citing *Rippo v. State*, 122 Nev. 1086, 1097, 146 P.3d 279, 286 (2006)). For purposes here, *Nika*'s discussion on retroactivity merits close analysis. The Court in *Nika* commenced its retroactivity analysis with *Colwell v. State*, 118 Nev. 807, 59 P.3d 463 (2002). In *Colwell*, the Nevada Supreme Court "detailed the rules of retroactivity, applying retroactivity analysis only to new constitutional rules of criminal law if those rules fell within one of two narrow exceptions." *Nika*, 124 Nev. at 1288, 198 P.3d at 850 (citing *Colwell*, 118 Nev. at 820, 59 P.3d at 531). *Colwell*, in turn, was premised on the United States Supreme Court's decision in *Teague v. Lane*, 489 U.S. 288, 109 S. Ct. 1060 (1989). A brief digression on *Teague* is therefore in order.

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In *Teague*, the United States Supreme Court did away with its previous retroactivity analysis in *Linkletter*,[5] replacing it with "a general requirement of nonretroactivity of new rules in federal collateral review." *Colwell*, 118 Nev. at 816, 59 P.3d at 469-70 (citing *Teague*, 489 U.S. at 299-310, 109 S. Ct. at 1069-76). In short, the Court in *Teague* held that "new *constitutional* rules of criminal procedure will not be applicable to those cases which have become final before the new rules are announced." 489 U.S. at 310, 109 S. Ct. at 1075 (emphasis added). This holding, however, was subject to two exceptions: first, "a new rule should be applied retroactively if it places 'certain kinds of primary, private individual conduct beyond the power of the criminal law-making authority to proscribe,'" *Id.* at 311, 109 S. Ct. at 1075 (quoting *Mackey v. United States*, 401 U.S. 667, 692, 91 S. Ct. 1160, 1165 (1971) (Harlan, J., concurring in the judgments in part and dissenting in part)); and second, a new constitutional rule of criminal procedure should be applied retroactively if it is a "watershed rule[ ] of criminal procedure." *Id.* at 311, 109 S. Ct. at 1076 (citing *Mackey*, 401 U.S. at 693-94, 91 S. Ct. at 1165).

That *Teague* was concerned exclusively with new *constitutional* rules of criminal procedure is reinforced by reference to the very opinion from Justice Harlan relied on by the Court in *Teague*. *See Mackey*, 401 U.S. at 675-702, 91 S. Ct. at 1165-67. Justice Harlan's opinion in *Mackey* starts off acknowledging the nature of the issue facing the Court. *See Id.* at 675, 91 S. Ct. at 1165 ("These three cases have one question in common: the extent to which new *constitutional* rules prescribed by this Court for the conduct of criminal cases are applicable to other such cases which were litigated under different but then-prevailing *constitutional* rules." (emphasis added)). And when outlining the two exceptions that were ultimately adopted by the Court in *Teague*, Justice Harlan explicitly acknowledged the constitutional nature of these exceptions. *See Id.* at 692, 91 S. Ct. at 1165 ("New 'substantive due process' rules, that is, those that place, *as a matter of constitutional interpretation*, certain kinds of primary, private individual conduct beyond the power of the criminal law-making authority to proscribe, must, in my view, be placed on a different footing." (emphasis added));

[5] *Linkletter v. Walker*, 381 U.S. 618, 85 S. Ct. 1731 (1965).

Id. at 693, 91 S. Ct. at 1165 ("Typically, it should be the case that any conviction free from federal *constitutional* error at the time it became final, will be found, upon reflection, to have been fundamentally fair and conducted under those procedures essential to the substance of a full hearing. However, in some situations it might be that time and growth in social capacity, as well as judicial perceptions of what we can rightly demand of the adjudicatory process, will properly alter our understanding of the bedrock procedural elements that must be found to vitiate the fairness of a particular conviction." (emphasis added)).

The Nevada Supreme Court's decision in *Colwell* further reinforces the notion that *Teague*'s exceptions were concerned exclusively with new *constitutional* rules. *See* 118 Nev. at 817, 59 P.3d at 470. In *Colwell*, the Court provided examples of "new rules" that fall into either exception. As to the first exception, the Nevada Supreme Court explained that "the Supreme Court's holding that the *Fourteenth Amendment* prohibits states from criminalizing marriages between persons of different races" is an example of a new substantive rule of law that should be applied retroactively on collateral review. *Id.* (citing *Mackey*, 401 U.S. at 692 n.7, 91 S. Ct at 1165 n.7) (emphasis added). Noting that this first exception "also covers 'rules prohibiting a certain category of punishment for a class of defendants because of their status,' "*Id.* (quoting *Penry v. Lynaugh*, 492 U.S. 302, 329-30, 109 S. Ct. 2934, 2952-53 (1989), *overruled on other grounds by Atkins v. Virginia*, 536 U.S. 304, 122 S. Ct. 2242 (2002)), the Nevada Supreme Court cited "the Supreme Court's [ ] holding that the *Eighth Amendment* prohibits the execution of mentally retarded criminals" as another example of a new substantive rule of law that should be applied retroactively on collateral review. *Id.* (citing *Penry*, 492 U.S. at 329-30, 109 S. Ct. at 2952-53) (emphasis added). As to the second exception, the Nevada Supreme Court cited "the right to counsel at trial"[6] as an example of a watershed rule of criminal procedure that should be applied retroactively on collateral review. *Id.* (citing *Mackey*, 401 U.S. at 694, 91 S. Ct. at 1165).

The Court in *Colwell*, however, found *Teague*'s retroactivity analysis too restrictive and, therefore, while adopting its general framework, chose "to provide broader retroactive

[6] As per *Gideon v. Wainwright*, 372 U.S. 335, 83 S. Ct. 792 (1963), whose holding was premised the Sixth and Fourteenth Amendments—i.e., *constitutional* principles.

application of new constitutional rules of criminal procedure than *Teague* and its progeny require." *Id.* at 818, 59 P.3d at 470; *see also Id.* at 818, 59 P.3d at 471 ("Though we consider the approach to retroactivity set forth in *Teague* to be sound in principle, the Supreme Court has applied it so strictly in practice that decisions defining a constitutional safeguard rarely merit application on collateral review.").[7] First, the Court in *Colwell* narrowed *Teague*'s definition of a "new rule," which it had found too expansive.[8] *Id.* at 819-20, 59 P.3d. at 472 ("We consider too sweeping the proposition, noted above, that a rule is new whenever any other reasonable interpretation or prior law was possible. However, a rule is new, for example, when the decision announcing it overrules precedent, or 'disapproves a practice this Court had arguably sanctioned in prior cases, or overturns a longstanding practice that lower courts had uniformly approved.' "(quoting *Griffith v. Kentucky*, 479 U.S. 314, 325, 107 S. Ct. 708, 714 (1987)). And second, the Court in *Colwell* expanded on *Teague*'s two exceptions, which it had found too "narrowly drawn":

> When a rule is new, it will still apply retroactively in two instances: (1) if the rule establishes that it is unconstitutional to proscribe certain conduct as criminal or to impose a type of punishment on certain defendants because of their status or offense; or (2) if it establishes a procedure without which the likelihood of an accurate conviction is seriously diminished. These are basically the exceptions defined by the Supreme Court. But we do not limit the first exception to 'primary, private individual' conduct, allowing the possibility that other conduct may be constitutionally protected from criminalization and warrant retroactive relief. And with the second exception, we do not distinguish a separate requirement of 'bedrock' or 'watershed' significance: if accuracy is seriously diminished without the rule, the rule is significant enough to warrant retroactive application.

Id. at 820, 59 P.3d at 472. Notwithstanding this expansion of the protections afforded in *Teague*, the Court in *Colwell* never lost sight of the fact that *Teague*'s retroactivity analysis

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[7] As the Nevada Supreme Court explained in *Colwell*, it was free to deviate from the standard laid out in *Teague* so long as it observed the minimum protections afforded by *Teague*. *See* 118 Nev. at 817-18, 59 P.3d at 470-71; *see also Johnson v. New Jersey*, 384 U.S. 719, 733, 86 S. Ct. 1772, 1781 (1966)).

[8] This has the effect of affording greater protection than *Teague* insofar as defendants seeking collateral review here in Nevada will be able to avail themselves more frequently of the principle that "[i]f a rule is not new, then it applies even on collateral review of final cases." *Colwell*, 118 Nev. at 820, 59 P.3d at 472. Under *Teague*'s expansive definition for "new rule," most rules would be considered new by *Teague*'s standards and, thus, "given only prospective effect, absent an exception." *Id.* at 819, 59 P.3d at 471.

focuses on new rules of *constitutional* concern. If the new rule of criminal procedure is not constitutional in nature, *Teague*'s retroactivity analysis has no bearing.

One year later in *Clem v. State*, the Nevada Supreme Court reaffirmed the modified *Teague* retroactivity analysis set out in *Colwell*. 119 Nev. 615, 626-30, 81 P.3d 521, 529-32 (2008). Notably, the Court in *Clem* explained that it is "not required to make retroactive its new rules of state law that do not implicate constitutional rights." *Id.* at 626, 81 P.3d at 529. The Court further noted that "[t]his is true even where [its] decisions overrule or reverse prior decisions to narrow the reach of a substantive criminal statute." *Id.* The Court then provided the following concise overview of the modified *Teague* retroactivity analysis set out in *Colwell*:

> Therefore, on collateral review under *Colwell*, if a rule is not new, it applies retroactively; if it is new, but not a constitutional rule, it does not apply retroactively; and if it is new and constitutional, then it applies retroactively only if it falls within one of *Colwell*'s delineated exceptions.

Id. at 628, 81 P.3d at 531. Thus, *Clem* reiterated that if the new rule of criminal procedure is not constitutional in nature, *Teague*'s retroactivity analysis has no relevance. *Id.* at 628-629, 81 P.3d at 531 ("Both *Teague* and *Colwell* require limited retroactivity on collateral review, but neither upset the usual rule of nonretroactivity for rules that carry no constitutional significance.").[9]

It is on the basis of *Colwell* and *Clem* that the Court in *Nika* affirmed its previous holding[10] that *Byford* is not retroactive. 119 Nev. at 1288, 198 P.3d at 850 ("We reaffirm our decisions in *Clem* and *Colwell* and maintain our course respecting retroactivity analysis—if a rule is new but not a constitutional rule, it has no retroactive application to convictions that are final at the time of the change in the law."). The Court in *Nika* then explained how the change

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[9] Petitioner omits any mention of *Colwell* or *Clem*, which were central to *Nika*'s retroactivity analysis regarding convictions that were final at the time of the change in the law. Instead, Petitioner cites *Nika*'s preceding analysis of why "the change effected by *Byford* properly applied to [the defendant in *Polk*, 503 F.3d at 910] as a matter of due process." *Nika*, 124 Nev. at 1287, 198 P.3d at 850; *see* Petition at 9. To be sure, the Court in *Nika*, in conducting this analysis, did rely on the retroactivity rules set out in *Bunkley v. Florida*, 538 U.S. 835, 123 S. Ct. 2020 (2003), and *Fiore v. White*, 531 U.S. 225, 121 S. Ct. 712 (2001), which, according to Petitioner were "drastically changed," Petition at 9, by the United States Supreme Court's decisions in *Montgomery* and *Welch*. Whether or not this is true is of no moment. The analysis in *Nika* regarding retroactivity in *Polk* had absolutely no bearing on *Nika*'s later analysis of the rules of retroactivity respecting convictions that were final at the time of the change in the law.

[10] *See Rippo*, 122 Nev. at 1097, 146 P.3d at 286.

in the law made by *Byford* "was a matter of interpreting a state statute, not a matter of constitutional law." *Id.* Accordingly, because it was not a new *constitutional* rule of criminal procedure of the type contemplated by *Teague* and *Colwell*, the change wrought in *Byford* was not to have retroactive effect on collateral review to convictions that were final before the change in the law.

Neither *Montgomery* nor *Welch* alter *Teague*'s—and, by extension, *Colwell*'s—underlying premise that the two exceptions to the general rule of nonretroactivity must implicate constitutional concerns before coming into play. In *Montgomery*, the United States Supreme Court had to consider whether *Miller v. Alabama*, 567 U.S. __, 132 S. Ct. 2455 (2012), which held that a mandatory sentence of life without parole for juvenile homicide offenders violates the Eighth Amendment's prohibition on "cruel and unusual punishment," had to be applied retroactively to juvenile offenders whose convictions and sentences were final at the time when *Miller* was decided. __ U.S. at __, 136 S. Ct. at 725. To answer this question, the Court in *Montgomery* employed the retroactivity analysis set out in *Teague*. *Id.* at __, 136 S. Ct. at 728-36. As to whether *Miller* announced a new "substantive rule of constitutional law," *Id.* at __, 136 S. Ct. at 734, such that it fell within the first of the two exceptions announced in *Teague*, the Court in *Montgomery* commenced its analysis by noting that "the 'foundation stone' for *Miller*'s analysis was [the] Court's line of precedent holding certain punishments disproportionate when applied to juveniles." *Id.* at ___, 136 S. Ct. at 732. This "line of precedent" included the Court's previous decision in *Graham v. Florida*, 560 U.S. 48, 130 S. Ct. 2011 (2010), and *Roper v. Simmons*, 543 U.S. 551, 125 S. Ct. 1183 (2005), the holdings of which were premised on constitutional concerns—namely, the Eighth Amendment. __ U.S. at __, 136 S. Ct. at 723 (explaining how *Graham* "held that the Eighth Amendment bars life without parole for juvenile nonhomicide offenders" and how *Roper* "held that the Eighth Amendment prohibits capital punishment for those under the age of 18 at the time of their crimes"). After elaborating further on the considerations discussed in *Roper* and *Graham* that underlay the Court's holding in *Miller*, *Id.* at __, 136 S. Ct. at 733-34, the Court went on to conclude the following:

> Because *Miller* determined that sentencing a child to life without parole is excessive for all but the rare juvenile offender whose crime reflects irreparable corruption, [ ] it rendered life without parole *an unconstitutional penalty* for a class of defendants because of their status—that is, juvenile offenders whose crimes reflect the transient immaturity of youth. As a result, *Miller* announced a substantive rule of *constitutional* law. Like other substantive rules, *Miller* is retroactive because it necessarily carr[ies] a significant risk that a defendant—here, the vast majority of juvenile offenders—faces a punishment that the law cannot impose upon him.

Id. at __, 136 S. Ct. at 734 (internal citations omitted) (quotation marks omitted) (alteration in original) (emphasis added).

Petitioner, however, gets caught up in *Montgomery*'s preceding jurisdictional analysis in which it had to decide, as a preliminary matter, whether a State is under an "obligation to give a new rule of constitutional law retroactive effect in its own collateral review proceedings." *Id.* at __, 136 S. Ct. at 727; *see* Petition at 17, 19, 25. Petitioner makes much ado about *Montgomery*'s discussion on this front, arguing that the Court in *Montgomery* "established a new rule of constitutional law, namely that the 'substantive' exception to the *Teague* rule applies in state courts as a matter of due process." Petition at 25. This assertion, while true, shortchanges the Court's jurisdictional analysis. In addressing the jurisdictional question and discussing *Teague*'s first exception to the general rule of nonretroactivity in collateral review proceedings, *Montgomery* actually reinforces the notion that *Teague*'s retroactivity analysis is relevant only when considering a new *constitutional* rule. *See, e.g.*, *Id.* at __, 136 S. Ct. at 727 ("States may not disregard a controlling, *constitutional* command in their own courts." (emphasis added)); *Id.* at __, 136 S. Ct. at 728 (explaining that under the first exception to the general rule of nonretroactivity discussed in *Teague*, "courts must give retroactive effect to new substantive rules of *constitutional* law" (emphasis added)); *Id.* at __, 136 S. Ct. at 729 ("The Court now holds that when a new substantive rule of *constitutional* law controls the outcome of a case, the Constitution requires state collateral review courts to give retroactive effect to that rule." (emphasis added)); *Id.* at __, 136 S. Ct. at 729-30 ("Substantive rules, then, set forth categorical *constitutional* guarantees that place certain criminal laws and punishments altogether beyond the State's power to impose. It follows that

when a State enforces a proscription or penalty barred *by the Constitution*, the resulting conviction or sentence is, by definition, unlawful." (emphasis added)); *Id.* at __, 136 S. Ct. at 730 ("By holding that new substantive rules are, indeed, retroactive, *Teague* continued a long tradition of giving retroactive effect to *constitutional* rights that go beyond procedural guarantees." (emphasis added)); *Id.* at __, 136 S. Ct. at 731 ("A penalty imposed pursuant to an *unconstitutional* law is no less void because the prisoner's sentence became final before the law was held unconstitutional. There is no grandfather clause that permits States to enforce punishments the *Constitution* forbids." (emphasis added)); *Id.* at __, 136 S. Ct. at 731-32 ("Where state collateral review proceedings permit prisoners to challenge the lawfulness of their confinement, States cannot refuse to give retroactive effect to a substantive *constitutional* right that determines the outcome of that challenge." (emphasis added)). *Montgomery*'s holding that State courts are to give retroactive effect to new substantive rules of constitutional law simply makes universal what has already been accepted as common practice in Nevada for almost 15 years—i.e., that new rules of constitutional law are to have retroactive effect in State collateral review proceedings. *See Colwell*, 118 Nev. at 818-21, 59 P.3d at 471-72; *Clem*, 119 Nev. at 628-29, 81 P.3d at 530-31.

Petitioner, however, really just uses *Montgomery* as a bridge to explain why he believes that the United States Supreme Court's more recent decision in *Welch* mandates that *Byford* is retroactive even as to those convictions that were final at the time that it was decided. Thus, the focal point is not so much *Montgomery*—which, again, made constitutional (i.e., that State courts must give retroactive effect to new substantive rules of constitutional law) what the Nevada Supreme Court has already accepted in practice—but rather *Welch*, which according to Petitioner, "indicated that the *only* requirement for determining whether an interpretation of a criminal statute applies retroactivity is whether the interpretation narrows the class of individuals who can be convicted of the crime." Petition at 9 (emphasis in original). Once again Petitioner shortchanges the Supreme Court's analysis by making such an unqualified assertion—this time to the point of misrepresenting the Court's holding in *Welch*.

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In *Welch*, the Court had to consider whether *Johnson v. United States*, 576 U.S. __, 135 S. Ct. 2551 (2015), which held that the residual clause of the Armed Career Criminal Act ("ACCA") of 1984, 18 U.S.C. § 924(e)(2)(B)(ii), was unconstitutionally void for vagueness, is retroactive in cases on collateral review. __ U.S. at __, 136 S. Ct. at 1260-61. Not surprisingly, to answer this question, the Court resorted to the retroactivity analysis set out in *Teague*. *Id.* at __, 136 S. Ct. at 1264-65. The Court commenced its application of the *Teague* retroactivity analysis by recognizing that "[u]nder *Teague*, as a general matter, 'new *constitutional* rules of criminal procedure will not be applicable to those cases which have become final before the new rules are announced,' "*Id.* at __, 136 S. Ct. at 1264 (quoting *Teague*, 489 U.S. at 310, 109 S. Ct. at 1075 (emphasis added)), and that this general rule was subject to the two exceptions that have already been discussed at great length above. Finding it "undisputed that *Johnson* announced a new rule," the Court explained that the specific question at issue was whether this new rule was "substantive." *Id.*[11] Then, upon concluding that "*Johnson* changed the substantive reach of the [ACCA]" by "'altering the range of conduct or the class of persons that the [Act] punishes,' "the Court held that "the rule announced in *Johnson* is substantive." *Id.* at __, 136 S. Ct. at 1265 (quoting *Schriro v. Summerlin*, 542 U.S. 348, 353, 124 S. Ct. 2519, 2523 (2004)).

Salient in the Court's analysis was the principle announced in *Schriro*, that "[a] rule is substantive rather than procedural if it alters the range of conduct or the class of persons that the law punishes." 542 U.S. at 353, 124 S. Ct. at 2523; *see Welch*, __ U.S. at __, 136 S. Ct. at 1264-65 (citing *Schriro*, 542 U.S. at 353, 124 S. Ct. at 2523). In setting out this principle, the Court in *Schriro* relied upon *Bousley v. United States*, which, in turn, relied upon *Teague* in explaining the "distinction between substance and procedure" as far as new rules of constitutional law are concerned. *See* 523 U.S. 614, 620-621, 118 S. Ct. 1604, 1610 (1998) (citing *Teague*, 489 U.S. at 311, 109 S. Ct. at 1075). The upshot of this is that the key principle relied on by the Court in *Welch* in holding that *Johnson* was a new substantive rule is ultimately rooted in *Teague*, which, as discussed above, is concerned exclusively with new rules of

[11] The parties agreed that the second *Teague* exception was not applicable. *Welch*, __ U.S. at __, 136 S. Ct. at 1264.

constitutional import. That is to say, if the rule is new, but not constitutional in nature, there is no need to resort to either of the *Teague* exceptions.

Juxtaposing the invalidation of the residual clause of the ACCA by *Johnson* with the change in Nevada law on first-degree murder[12] effected by *Byford* will help drive home the point that the former was premised on constitutional concerns not present in the latter. This, in turn, will help illustrate why *Teague*'s retroactivity analysis has relevance only to the former. In *Johnson*, the United States Supreme Court considered whether the residual clause of the ACCA violated "the Constitution's prohibition of vague criminal laws." 576 U.S. at __, 135 S. Ct. at 2555. The "residual clause" is part of the ACCA's definition of the term "violent felony":

> the term 'violent felony' means any crime punishable by imprisonment for a term exceeding one year . . . that—
> (i) has as an element the use, attempted use, or threatened use of physical force against the person of another; or
> (ii) is burglary, arson, or extortion, involves use of explosives, *or otherwise involves conduct that presents a serious potential risk of physical injury to another*;

18 U.S.C. § 924(e)(2)(B) (emphasis added). It is the italicized portion in clause (ii) of § 924(e)(2)(B) that came to be known as the "residual clause." *Johnson*, 576 U.S. at __, 135 S. Ct. at 2556. Pursuant to the ACCA, a felon who possesses a firearm after three or more convictions for a "violent felony" (defined above) is subject to a minimum term of imprisonment of 15 years to a maximum term of life. § 924(e)(1); *Johnson*, 576 U.S. at __, 135 S. Ct. at 2556. Thus, a conviction for a felony that "involves conduct that presents a serious potential risk of physical injury"—i.e., a felony that fell under the residual clause—could very well have made the difference between serving a maximum of 10 years in prison versus a maximum of life in prison. *See Johnson*, 576 U.S. at __, 135 S. Ct. at 2555 ("In general, the law punishes violation of this ban by up to 10 years' imprisonment. [ ] But if the violator has three or more earlier convictions for . . . a 'violent felony,' the [ACCA] increases his prison term to a minimum of 15 years and a maximum of life." (internal citation omitted)).

[12] Specially, where the first-degree murder is premised on a theory of willfulness, deliberation, and premeditation. NRS 200.030(1)(a).

To understand the issue that arose with the residual clause, it helps to understand the context in which it was applied. *See Welch*, __ U.S. at __, 136 S. Ct. at 1262 ("The vagueness of the residual clause rests in large part on its operation under the categorical approach."). The United States Supreme Court employs what is known as the categorical approach in deciding whether an offense qualifies as a violent felony under § 924(e)(2)(B). *Id.* at __, 136 S. Ct. at 1262 (citing *Johnson*, 576 U.S. at __, 135 S. Ct. at 2557). Under the categorical approach, "a court assesses whether a crime qualifies as a violent felony 'in terms of how the law defines the offense and not in terms of how an individual offender might have committed it on a particular occasion.' "*Johnson*, 576 U.S. at __, 135 S. Ct. at 2557 (quoting *Begay v. United States*, 553 U.S. 137, 141, 128 S. Ct. 1581, 1584 (2008)). The issue with the residual clause was that it required "a court to picture the kind of conduct that the crime involves in 'the ordinary case,' and to judge whether that abstraction presents a serious potential risk of physical injury." *Id.* (quoting *James v. United States*, 550 U.S. 192, 208, 127 S. Ct. 1586, 1597 (2007)).

The Court in *Johnson* found that "[t]wo features of the residual clause conspire[d] to make it unconstitutionally vague." *Id.* First, that the residual clause left "grave uncertainty about how to estimate the risk posed by a crime"; and second, that it left "uncertainty about how much risk it takes for a crime to qualify as a violent felony." *Id.* at __, 135 S. Ct. at 2557-58. Because of these uncertainties, the Court in *Johnson* explained that "[i]nvoking so shapeless a provision to condemn someone to prison for 15 years to life does not comport with the Constitution's guarantee of due process." *Id.* at __, 135 S. Ct. at 2560. Accordingly, "[t]he *Johnson* Court held the residual clause unconstitutional under the void-for-vagueness doctrine, a doctrine that is mandated by the Due Process Clauses of the *Fifth Amendment* (with respect to the Federal Government) and the *Fourteenth Amendment* (with respect to the States)." *Welch*, __ U.S. __, 136 S. Ct. at 1261-62 (emphasis added).

Unlike the invalidation of the residual clause of the ACCA on constitutional grounds, the change in the law on first-degree murder effected by *Byford* implicated no constitutional concerns. The Nevada Supreme Court in *Nika* explained in very clear terms that its "decision

in *Byford* to change Nevada law and distinguish between 'willfulness,' 'premeditation,' and 'deliberation' was a matter of interpreting a state statute, *not a matter of constitutional law*." 124 Nev. at 1288, 198 P.3d at 850 (emphasis added). To reinforce this point, the Court in *Nika* noted how other jurisdictions "differ in their treatment of the terms 'willful,' 'premeditated,' and 'deliberate' for first-degree murder." *Id.*; *see Id.* at 1288-89, 198 P.3d at 850-51 ("As explained earlier, several jurisdictions treat these terms as synonymous while others, for example California and Tennessee, ascribe distinct meanings to these words. These different decisions demonstrate that the meaning ascribed to these words is not a matter of constitutional law.").

Conflating the change effected by *Johnson* with that effected by *Byford* ignores a fundamental legal distinction between the two. Because the residual clause was found unconstitutionally void for vagueness, defendants whose sentences were increased on the basis of this clause were sentenced on the basis of an unconstitutional provision and, thus, were unconstitutionally sentenced. Such a sentence is, as the Court in *Montgomery* would put it, "not just erroneous but contrary to law and, as a result, void." *See* __ U.S. at __, 136 S. Ct. at 731 (citing *Ex parte Siebold*, 100 U.S. 371, 375, 25 L. Ed. 717, 719 (1880)). Not so with the change effected by *Byford*. At no point has Nevada's law on first-degree murder been found unconstitutional. Defendants who were convicted of first-degree murder under NRS 200.030(1)(a) prior to *Byford* were nonetheless convicted under a constitutionally valid statute and, thus, were lawfully convicted. *See Nika*, 124 Nev. at 1287, 198 P.3d at 850 (explaining that "the *Kazalyn* instruction correctly reflected Nevada law before *Byford*").

It was the constitutional rights that underlay *Johnson*'s invalidation of the residual clause that made it a "substantive rule of constitutional law." *See Montgomery*, __ U.S. at __, 136 S. Ct. at 729. And as a "new" substantive rule of constitutional law, it fell within the first of the two exceptions to *Teague*'s general rule of nonretroactivity. Because *no* constitutional rights underlay the Nevada Supreme Court's change in Nevada's law on first-degree murder, the new rule announced in *Byford* does not fall within *Teague*'s "substantive rule" exception. The constitutional underpinnings of *Johnson*'s invalidation of the residual clause and the legal

ramifications stemming from this (i.e., that those whose sentences were increased pursuant to an *unconstitutional* provision were, in effect, *unconstitutionally* sentenced) were key to *Welch*'s holding that the change effected by *Johnson* is retroactive under the *Teague* framework.

Petitioner's reliance on *Welch*, however, goes beyond the Court's holding and *ratio decidendi*. In his exposition of *Welch*, Petitioner goes on to describe the Court's treatment of the arguments raised by *Amicus*. *See* Petition at 17-18; *Welch*, __ U.S. at __, 136 S. Ct. at 1265-68. Among the arguments raised by *Amicus* were (1) that the Court should adopt a different understanding of the *Teague* framework, "apply[ing] that framework by asking whether the constitutional right underlying the new rule is substantive or procedural"; (2) that a rule is only substantive if it limits Congress' power to legislate; and (3) that only "statutory construction cases are substantive because they define what Congress always intended the law to mean" as opposed to cases invalidating statutes (or parts thereof). *Welch*, __ U.S. at __, 136 S. Ct. at 1265-68. It was in addressing this third argument that the Court set out the "test" for determining when a rule is substantive that Petitioner's argument hinges on:

> Her argument is that statutory construction cases are substantive because they define what Congress always intended the law to mean—unlike *Johnson*, which struck down the residual clause regardless of Congress' intent.
>
> That argument is not persuasive. Neither *Bousley* nor any other case from this Court treats statutory interpretation cases as a special class of decisions that are substantive because they implement the intent of Congress. Instead, decisions that interpret a statute are substantive if and when they meet the normal criteria for a substantive rule: when they 'alte[r] the range of conduct or the class of persons that the law punishes.'

Id. at __, 136 S. Ct. at 1267 (quoting *Schriro*, 542 U.S. at 353, 124 S. Ct. at 2523). On the basis of this language, Petitioner comes to the following conclusion:

> What is critically important, and new, about *Welch* is that it explains, for the very first time, that the *only* test for determining whether a decision that interprets the meaning of a statute is substantive, and must apply retroactively to all cases, is whether the new interpretation meets the criteria for a substantive rule, namely whether it alters the range of conduct or the class of persons that the law punishes. Because this aspect of *Teague* is

> now a matter of constitutional law, state courts are required to apply this rule from *Welch*.

Petition at 19 (emphasis in original).

Petitioner, however, fails to grasp that that this "test" he relies so heavily on is nothing more than judicial dictum. *Judicial Dictum*, Black's Law Dictionary 519 (9th Ed. 2009) (defining "judicial dictum" as "[a] opinion by a court on a question that is directly involved, briefed, and argued by counsel, and even passed on by the court, but that is not essential to the decision"). This "test" set out by the Court was in response to an argument made by *Amicus* and was not essential to *Welch*'s holding regarding *Johnson*'s retroactivity. As judicial dictum, this "test" is not binding on Nevada courts as Petitioner argues. *See Black v. Colvin*, 142 F. Supp. 3d 390, 395 (E.D. Pa. 2015) ("Lower courts are not bound by dicta." (citing *United States v. Warren*, 338 F.3d 258, 265 (3d Cir. 2003)))

Interestingly, though, in setting out this test, the Court quoted verbatim from the very portion of its decision in *Schriro* that has been cited above, *see supra* at 14, for the proposition that the key principle relied on by the *Welch* Court—in holding that *Johnson* was a new substantive rule—is ultimately rooted in *Teague*, which, again, is concerned exclusively with new rules of constitutional import. Thus, to the extent the "test" relied on by Petitioner is grounded on this text from *Schriro*, Petitioner takes it out of context by ignoring the fact that this statement in *Schriro* was based on *Bousley*'s discussion of the substance/procedure distinction respecting new rules of constitutional law, which was, in turn, premised largely on *Teague*. *See Bousley,* 523 U.S. at 620-621, 118 S. Ct. at 1610 (citing *Teague*, 489 U.S. at 311, 109 S. Ct. at 1075). But, to the extent that this "test" is unmoored from the constitutional underpinnings of *Teague*'s retroactivity analysis, it is, after all, nothing more than dictum. Either way, Petitioner's reliance on this language from *Welch* is misguided.

Because neither *Montgomery* nor *Welch* alter *Teague*'s retroactivity analysis, the Nevada Supreme Court's decision in *Colwell*, which adopted *Teague*'s framework, remains valid and, thus, controlling in this matter. And as reaffirmed by the Nevada Supreme Court in *Nika*, *Byford* has no retroactive application on collateral review to convictions, like

Petitioner's, that became final before the new rule was announced. 124 Nev. at 1287-89, 198 P.3d at 850-51. Consequently, Petitioner's reliance on *Montgomery* and *Welch* to meet NRS 34.726(1)(a)'s criterion fails.

2. Petitioner Has Failed To Establish That Dismissal Of The Petition As Untimely Will Unduly Prejudice Him.

Turning now to NRS 34.726(1)'s second prong—i.e., undue prejudice—necessary to establish good cause, this Court should find that Petitioner has failed to establish that he was unduly prejudiced by the use of the *Kazalyn* instruction. To meet NRS 34.726(1)(b)'s criterion, "a petitioner must show that errors in the proceedings underlying the judgment worked to the petitioner's actual and substantial disadvantage." *State v. Huebler*, 128 Nev.__, __, 275 P.3d 91, 95 (2012) (citing *Hogan v. Warden*, 109 Nev. 952, 959–60, 860 P.2d 710, 716 (1993)).

Here, Petitioner cannot show that he was unduly prejudiced by the use of the *Kazalyn* instruction because there was overwhelming evidence of premeditation, deliberation, and willfulness. In its Order affirming the denial of Petitioner's first habeas petition, the Nevada Supreme Court considered Petitioner's challenge to the *Kazalyn* instruction given at trial—albeit, in context of a claim of ineffective assistance of counsel:

> Second, Ennis claimed that his appellate counsel was ineffective for failing to argue that the jury instruction concerning premeditation and deliberation impermissibly removed the distinction between first and second-degree murder. In Kazalyn v. State, this court approved a jury instruction regarding premeditation that is almost identical to the one given by the district court in the instant case. Subsequent to the resolution of Ennis' direct appeal, however, this court expressly disapproved of the Kazalyn instruction and set forth an alternative jury instruction for future use. Nevertheless, a conviction in which the Kazalyn instruction was given is not automatically overturned. This court reviews the case to determine if sufficient evidence was adduced at trial to establish premeditation and deliberation. Here, multiple witnesses testified that Ennis borrowed David Nix's saw-off shotgun and stated his intention to kill the victim. Therefore, sufficient evidence of premeditation *and deliberation* was presented at trial, such that an appeal of this issue did not have a reasonable likelihood of success.

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Ennis v. State, Docket No. 43017 at *4-5 (Order of Affirmance, filed November 3, 2004) (footnotes omitted) (emphasis added). Thus, to the extent that the Nevada Supreme Court rejected Petitioner's challenge to the *Kazalyn* instruction on the merits, Petitioner's renewed challenge is barred under the doctrine of law of the case. *See State v. Loveless*, 62 Nev. 312, 317, 150 P.2d 1015, 1017 (1944) (quoting *Wright v. Carson Water Co.*, 22 Nev. 304, 308, 39 P. 872, 873-74 (1895)) ("The decision (on the first appeal) is the law of the case, not only binding on the parties and their privies, but on the court below and on this court itself. A ruling of an appellate court upon a point distinctly made upon a previous appeal is, in all subsequent proceedings in the same case upon substantially the same facts, a final adjudication, from the consequences of which the court cannot depart."). As explained by the Nevada Supreme Court in *Hall v. State*, 91 Nev. 314, 316, 535 P.2d 797, 799 (1975), "[t]he doctrine of the law of the case cannot be avoided by a more detailed and precisely focused argument subsequently made after reflection upon the previous proceedings." *See also Pellegrini v. State*, 117 Nev. 860, 879, 34 P.3d 519, 532 (2001) (citing *McNelton v. State,* 115 Nev. 396, 414-15, 990 P.2d 1263, 1275 (1999)) ("Under the law of the case doctrine, issues previously determined by this court on appeal may not be reargued as a basis for habeas relief."). And because the Nevada Supreme Court has already determined that Petitioner was not prejudiced by the use of the *Kazalyn* instruction, Petitioner necessarily fails to establish undue prejudice for purposes of overcoming the procedural bars applicable to his third habeas petition.

Petitioner counters by arguing that the "[t]he evidence against Ennis was not so great that it precluded a verdict of second-degree murder." Petition at 21. The basis, in part, for this argument is that "the credibility of all the witnesses was questionable." *Id.*; *see Id.* at 21-22. Petitioner raised a similar argument on direct appeal, complaining "that several of the state's witnesses fabricated their testimony, thereby suggesting that the jury's verdict was not based on credible or reliable evidence." In response, the Nevada Supreme Court explained the following:

> This case rested on the credibility of each of the witnesses, including Ennis. Despite the credibility issues raised by Ennis, the jurors chose to accept as true the testimony of the State's

> witnesses. We conclude that Ennis is inappropriately asking this court to reassess the weight of the evidence and pass on the credibility of the witnesses. See Lay, 110 Nev. at 1192, 886 P.2d at 450. Furthermore, we have reviewed the record in this case and conclude that substantial evidence exists to support the conviction of murder with the use of a deadly weapon.

Ennis v. State, Docket No. at 28322 at *3 (Order Dismissing Appeal, filed December 30, 1997). This Court should likewise reject Petitioner's attempt to have this Court "reassess the weight of the evidence and pass on the credibility of the witnesses." *See Id.*

Based on the foregoing, this Court should find that the instant Petition is untimely pursuant to NRS 34.726(1) and that Petitioner has failed to establish "good cause for delay." The United States Supreme Court's decisions in *Montgomery* and *Welch* do not provide a new legal basis to satisfy NRS 34.726(1)(a)'s criterion that the delay not be the fault of the petitioner. And Petitioner has also failed to establish NRS 34.726(1)(b)'s criterion inasmuch as he has failed to establish that he was unduly prejudiced by the use of the *Kazalyn* instruction. That being the case, this Court should deny the Petition on the basis that it is procedurally barred under NRS 34.726(1).

B. The Petition Is Successive Under NRS 34.810(2), And Petitioner Has Failed To Establish Good Cause And Actual Prejudice.

NRS 34.810(2) requires the district court to dismiss "[a] second or successive petition if the judge or justice determines that it fails to allege new or different grounds for relief and that the prior determination was on the merits or, if new and different grounds are alleged, the judge or justice finds that the failure of the petitioner to assert those grounds in a prior petition constituted an abuse of the writ." And as with NRS 34.726(1), the procedural bar described in NRS 34.810(2) is mandatory. *See Evans v. State*, 117 Nev. 609, 622, 28 P.3d 498, 507 (2001) ("[A] court *must dismiss* a habeas petition if it presents claims that either were or could have been presented in an earlier proceeding, unless the court finds both cause for failing to present the claims earlier or for raising them again and actual prejudice to the petitioner." (emphasis added)).

//

As noted above, the instant Petition constitutes the second habeas petition that Petitioner has filed. Petitioner filed his first habeas petition on December 29, 1998. On March 11, 2004, the Court denied the petition on the merits and entered its Findings of Fact, Conclusions of Law and Order to that effect on April 5, 2004. While Petitioner's claim attacking the *Kazalyn* instruction has been raised once before,[13] this is the first time that he has attacked it on the basis of the United States Supreme Court's decision in *Montgomery* and *Riley*. To the extent that this claim constitutes a "new and different" ground for relief, this Court should find that Petitioner's failure to raise it in a prior petition constitutes an abuse of the writ. And while NRS 34.810(3) affords Petitioner the opportunity to overcome the procedural bar described in subsection (2), Petitioner fails to establish either good cause or actual prejudice for the very same reasons that he failed to establish good cause for delay under NRS 34.726(1). *See supra* at 4-22. That being the case, this Court should deny the Petition on the basis that it is procedurally barred under NRS 34.810(2).

C. The State Specifically Pleads Laches Under NRS 34.800(2) Because More Than 19 Years Have Elapsed Between The Nevada Supreme Court's Decision On Petitioner's Direct Appeal Of The Judgment Of Conviction And The Filing Of The Instant Petition.

NRS 34.800(2) creates a rebuttable presumption of prejudice to the State if "[a] period exceeding 5 years [elapses] between the filing of a judgment of conviction, an order imposing a sentence of imprisonment or a decision on direct appeal of a judgment of conviction and the filing of a petition challenging the validity of a judgment of conviction." The Nevada Supreme Court observed in *Groesbeck v. Warden*, 100 Nev. 259, 261, 679 P.2d 1268, 1269 (1984), how "petitions that are filed many years after conviction are an unreasonable burden on the criminal justice system" and that "[t]he necessity for a workable system dictates that there must exist a time when a criminal conviction is final." To invoke NRS 34.800(2)'s presumption of prejudice, the statute requires that the State specifically plead laches.

The State affirmatively pleads laches in this case. In order to overcome the presumption of prejudice to the State, Petitioner has the heavy burden of proving a fundamental miscarriage

[13] Petitioner attacked the *Kazalyn* instruction in his first habeas petition. As noted above, the Nevada Supreme Court rejected this argument. *See Ennis,* Docket No. 43017 at *4-5.

of justice. *See Little v. Warden*, 117 Nev. 845, 853, 34 P.3d 540, 545 (2001). Based on Petitioner's representations and on what he has filed with this Court thus far, Petitioner has failed to meet that burden. That being the case, this Court should dismiss the Petition pursuant to NRS 34.800(2).

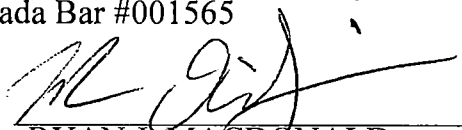
CONCLUSION

Based on the foregoing, the State respectfully requests that this Court deny the Petition for Writ of Habeas Corpus (Post-Conviction).

DATED this 26th day of May, 2017.

Respectfully submitted,

STEVEN B. WOLFSON
Clark County District Attorney
Nevada Bar #001565

BY 
RYAN J. MACDONALD
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CERTIFICATE OF SERVICE

I certify that on the 26th day of May, 2017, I e-mailed a copy of the foregoing State's Response to Petition for Writ of Habeas Corpus (Post-Conviction), to:

C.B. KIRSCHNER
Assistant Federal Public Defender
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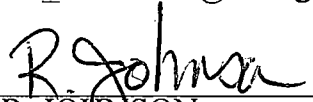
BY 
R. JOHNSON
Secretary for the District Attorney's Office

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CLERK OF THE COURT

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Attorney for Petitioner Bruce Ennis

IN THE EIGHTH JUDICIAL DISTRICT COURT OF THE

STATE OF NEVADA IN AND FOR THE COUNTY OF CLARK

BRUCE MAYO ENNIS,

Petitioner,

v.

TIMOTHY FILSON,

Respondents.

Case No. C110002
Dept. No. ____

Date of Hearing: **5/30/17**
Time of Hearing: **8:30 AM**

(Not a Death Penalty Case)

PETITION FOR WRIT OF HABEAS CORPUS
(POST CONVICTION)

1. Name of institution and county in which you are presently imprisoned or where and how you are presently restrained of your liberty: Ely State Prison; White Pine County, Nevada

2. Name and location of court which entered the judgment of conviction under attack: Eight Judicial District Court, Clark County, Nevada

3. Date of judgment of conviction: January 30, 1996

4. Case Number: C110002

5. (a) Length of Sentence: Life without the possibility of parole consecutive to life without the possibility of parole

(b) If sentence is death, state any date upon which execution is scheduled: N/A

6. Are you presently serving a sentence for a conviction other than the conviction under attack in this motion? Yes [ ] No [X]

If "yes", list crime, case number and sentence being served at this time: Nature of offense involved in conviction being challenged:

7. Nature of offense involved in conviction being challenged: First Degree Murder with Use of a Deadly Weapon

8. What was your plea?

(a) Not guilty X (c) Guilty but mentally ill _____

(b) Guilty _____ (d) Nolo contendere _____

9. If you entered a plea of guilty or guilty but mentally ill to one count of an indictment or information, and a plea of not guilty to another count of an indictment or information, or if a plea of guilty or guilty but mentally ill was negotiated, give details:

Petitioner pleaded not guilty to the charges of Murder and Robbery. Petitioner was also charged with Possession of Firearm by Ex-Felon; that charged was severed from the jury trial. The jury found Petitioner guilty of First Degree Murder with Use of a Deadly Weapon and not guilty of Robbery with Use of a Deadly Weapon. Following his conviction by the jury, Petitioner pleaded guilty to Possession of Firearm by Ex-Felon.

10. If you were found guilty after a plea of not guilty, was the finding made by: (a) Jury X (b) Judge without a jury _____

11. Did you testify at the trial? Yes __X__ No _____

12. Did you appeal from the judgment of conviction? Yes __X__ No __

13. If you did appeal, answer the following:

(a) Name of Court: Nevada Supreme Court

(b) Case number or citation: 28322

(c) Result: Appeal dismissed on December 30, 1997; Remittitur issued on January 28, 1998

14. If you did not appeal, explain briefly why you did not: N/A

15. Other than a direct appeal from the judgment of conviction and sentence, have you previously filed any petitions, applications or motions with respect to this judgment in any court, state or federal? Yes __X__ No _____

16. If your answer to No. 15 was "yes," give the following information:

(a) (1) Name of Court: Eighth Judicial District Court

(2) Nature of proceeding: Post-Conviction Petition for Writ of Habeas Corpus

(3) Ground raised:

I. Petitioner's conviction and sentence are invalid under the federal constitutional guarantees of due process, equal protection, trial before an impartial jury and a reliable sentence, as guaranteed by the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution, because of the trial court's failure to properly instruct the jury concerning the degree of premeditation and deliberation required to support a conviction for first degree murder.

II. Petitioner's conviction and sentence are invalid under the federal constitutional guarantees of due process, equal protection, a fair trial before an impartial jury, effective assistance of counsel, and a reliable sentence, as guaranteed by the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States

Constitution, due to the ineffective assistance of trial counsel.

III. Petitioner's conviction and sentence are invalid under the federal constitutional guarantees of due process, equal protection, a fair trial before an impartial jury, effective assistance of counsel, and a reliable sentence, as guaranteed by the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution, due to the ineffective assistance of appellate counsel.

IV. Petitioner's conviction and sentence are invalid under the federal constitutional guarantees of due process, equal protection, the effective assistance of counsel, a fair tribunal, an impartial jury, and a reliable sentence, as guaranteed by the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution, due to the cumulative errors in the giving of erroneous jury instructions, and the systematic deprivation of Petitioner's right to effective assistance of counsel.

(4) Did you receive an evidentiary hearing on your petition, application or motion? Yes _____ No __X____

(5) Result: Petition denied

(6) Date of Result: April 5, 2004

(7) If known, citations of any written opinion or date of orders entered pursuant to such result: Nevada Supreme Court Order of Affirmance dated November 3, 2004

(b) As to any second petition, application or motion, give the same information:

(1) Name of court: United States District Court for the District of Nevada

(2) Nature of proceeding: Petition for Writ of Habeas Corpus Pursuant to 28 U.S.C. § 2254

(3) Grounds raised:

I. Ennis is in custody in violation of his right to due process pursuant to the Fifth and Fourteenth Amendments to the United States Constitution because the evidence adduced at trial was insufficient to prove murder in the first degree beyond a reasonable doubt.

II. The district court's jury instruction defining premeditation improperly minimized the state's burden of proof thereby violating Ennis' due process rights guaranteed by the Fifth, Sixth and Fourteenth Amendments to the United States Constitution.

III. The district court's reasonable doubt instruction improperly minimized the state's burden of proof thereby violating Ennis' due process rights guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution.

IV. Ennis is in custody in violation of his right to effective assistance of trial counsel as guaranteed by the Fifth, Sixth and Fourteenth Amendments to the United States Constitution.

A. Trial counsel failed to investigate the victim's prior acts of violence.

B. Appellate counsel failed to raise the issue of the trial court's erroneous jury instructions.

V. Ennis is entitled to relief because of the cumulative effect of the errors raised on direct appeal, in state habeas proceedings, and in this petition.

(4) Did you receive an evidentiary hearing on your petition, application or motion? Yes _____ No __X__

(5) Result: Petition denied

(6) Date of result: June 4, 2008

(7) If known, citations of any written opinion or date of orders entered pursuant to such result: Judgment entered June 6, 2008; Certificate of appealability denied July 30, 2009; Writ of certiorari denied January 11, 2010

(c) As to any third petition, application or motion, give the same information: N/A

(1) Name of court:

(2) Nature of proceeding:

(3) Grounds raised:

I.

II.

(4) Did you receive an evidentiary hearing on your petition, application or motion? Yes _____ No _____

(5) Result:

(6) Date of result:

(7) If known, citations of any written opinion or date of orders entered pursuant to such result:

17. Has any ground being raised in this petition been previously presented to this or any other court by way of petition for habeas corpus, motion, application or any other post-conviction proceeding? Yes If so, identify:

a. Which of the grounds is the same: Ground One

b. The proceedings in which these grounds were raised: First state post-conviction proceeding

c. Briefly explain why you are again raising these grounds.

Ground One is based upon a previously unavailable constitutional claim. *Clem v. State*, 119 Nev. 615, 621, 81 P.3d 521, 525-26 (2003). A petitioner has one-year to file a petition from the date that the claim has become available. *Rippo v. State*, 132 Nev. Adv. Op. 11, 368 P.3d 729, 739-40 (2016), *rev'd on other grounds*, *Rippo v. Baker*, 2017 WL 855913 (Mar. 6, 2017). Ground One is based upon the recent Supreme Court decisions in *Montgomery v. Louisiana*, 136 S. Ct. 718 (2016), and *Welch v. United States*, 136 S. Ct. 1257 (2016). *Montgomery* established a new rule of constitutional law, namely that the "substantive rule" exception to the *Teague* rule applies in state courts as a matter of due process. Furthermore, *Welch* clarified that this constitutional rule includes the Supreme Court's prior statutory interpretation decisions. Moreover, *Welch* established that the only requirement for an interpretation of a statute to apply retroactively under the "substantive rule" exception to *Teague* is whether the interpretation narrowed the class of individuals who could be convicted under the statute.

18. If any of the grounds listed in Nos. 23(a), (b), (c) and (d), or listed on any additional pages you have attached, were not previously presented in any other court, state or federal, list briefly what grounds were not so presented, and give your reasons for not presenting them. N/A

19. Are you filing this petition more than 1 year following the filing of the judgment of conviction or the filing of a decision on direct appeal? Yes. If so, state briefly the reasons for the delay.

Ground One is based upon a previously unavailable constitutional claim. *Clem v. State*, 119 Nev. 615, 621, 81 P.3d 521, 525-26 (2003). A petitioner has one-year to file a petition from the date that the claim has become available. *Rippo v. State*, 132 Nev. Adv. Op. 11, 368 P.3d 729, 739-40 (2016), *rev'd on other grounds*, *Rippo v. Baker*, 2017 WL 855913 (Mar. 6, 2017). Ground One is based upon the recent Supreme Court

decisions in *Montgomery v. Louisiana*, 136 S. Ct. 718 (2016), and *Welch v. United States*, 136 S. Ct. 1257 (2016), which established a new constitutional rule applicable to this case. This petition was filed within one year of *Welch*, which was decided on April 18, 2016.

20. Do you have any petition or appeal now pending in any court, either state or federal, as to the judgment under attack? Yes ____ No __X__

If yes, state what court and the case number:

21. Give the name of each attorney who represented you in the proceeding resulting in your conviction and on direct appeal: Theodore Manos and Laura Melia – trial counsel; Laura Melia – direct appeal

22. Do you have any future sentences to serve after you complete the sentence imposed by the judgment under attack: Yes ____ No __X__

23. State concisely every ground on which you claim that you are being held unlawfully. Summarize briefly the facts supporting each ground. If necessary you may attach pages stating additional grounds and facts supporting same.

GROUND ONE

UNDER RECENTLY DECIDED SUPREME COURT CASES, PETITIONER MUST BE GIVEN THE BENEFIT OF *BYFORD V. STATE*, AS A MATTER OF DUE PROCESS BECAUSE *BYFORD* WAS A SUBSTANTIVE CHANGE IN LAW THAT NOW MUST BE APPLIED RETROACTIVELY TO ALL CASES, INCLUDING THOSE THAT BECAME FINAL PRIOR TO *BYFORD*.

In *Byford v. State*, 116 Nev. 215, 994 P.2d 700 (2000), the Nevada Supreme Court concluded that the jury instruction defining premeditation and deliberation improperly blurred the line between these two elements. The court interpreted the first-degree murder statute to require that the jury find deliberation as a separate

element. However, the Nevada Supreme Court stated that this error was not of constitutional magnitude and that it only applied prospectively.

In *Nika v. State*, the Nevada Supreme Court acknowledged that *Byford* interpreted the first-degree murder statute by narrowing its terms. As a result, the court was wrong to only apply *Byford* prospectively. However, relying upon its interpretation of the current state of United States Supreme Court retroactivity rules, it held that, because *Byford* represented only a "change" in state law, not a "clarification," then *Byford* only applied to those convictions that had yet to become final at the time it was decided. The court concluded, as a result, that *Byford* did not apply retroactively to those convictions that had already become final.

However, in 2016, the United States Supreme Court drastically changed these retroactivity rules. First, in *Montgomery v. Louisiana*, the Supreme Court held that the question of whether a new constitutional rule falls under the "substantive exception" to the Teague retroactivity rules is a matter of due process. Second, in *Welch v. United States*, the Supreme Court clarified that the "substantive exception" of the *Teague* rules includes "interpretations" of criminal statutes. It further indicated that the *only* requirement for determining whether an interpretation of a criminal statute applies retroactively is whether the interpretation narrows the class of individuals who can be convicted of the crime.

Montgomery and *Welch* represent a change in law that allows petitioner to obtain the benefit of *Byford* on collateral review. The Nevada Supreme Court has acknowledged that *Byford* represented a substantive new rule. Under *Welch*, that means that it must be applied retroactively to convictions that had already become final at the time *Byford* was decided. The Nevada Supreme Court's distinction between "change" and "clarification" is no longer valid in determining retroactivity. And the state courts are required to apply the rules set forth in *Welch* because those

retroactivity rules are now, as a result of *Montgomery*, a matter of constitutional principle. Petitioner is entitled to relief because there is a reasonable likelihood that the jury applied the *Kazalyn* instruction in an unconstitutional manner.

Petitioner can also establish good cause to overcome the procedural bars. The new constitutional arguments based upon *Montgomery* and *Welch* were not previously available. Petitioner has filed the petition within one year of *Welch*. Petitioner can also show actual prejudice.

Accordingly, the petition should be granted.

I. BACKGROUND

A. *Kazalyn* First-Degree Murder Instruction

Ennis was charged with first-degree murder with use of a deadly weapon based on allegations that he shot and killed his stepfather. (Information.) The trial court provided the jury with the following instruction on premeditation and deliberation, known as the *Kazalyn*[1] instruction:

> Premeditation is a design, a determination to kill, distinctly formed in the mind at any moment before or at the time of the killing.
>
> Premeditation need not be for a day, an hour or even a minute. It may be as instantaneous as successive thoughts of the mind. For if the jury believes from the evidence that the act constituting the killing has been preceded by and has been the result of premeditation, no matter how rapidly the premeditation is followed by the act constituting the killing, it is willful, deliberate and premeditated murder.

(Jury Instructions, Instruction No. 8.)

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[1] *Kazalyn v. State*, 108 Nev. 67, 825 P.2d 578 (1992).

B. Conviction and Direct Appeal

A jury convicted Ennis of first-degree murder with use of a deadly weapon on December 4, 1995. (Verdict) The court sentenced Ennis to two, consecutive terms of life imprisonment without the possibility of parole. Ennis was also given a concurrent sentence of six years incarceration for possession of a firearm by ex-felon. (Judgment)

Ennis appealed the judgment of conviction. The Nevada Supreme Court issued an order dismissing the appeal on December 30, 1997. The conviction became final on March 30, 1998. *See Nika v. State*, 124 Nev. 1272, 198 P.3d 839, 849 (Nev. 2008) (conviction becomes final when judgment of conviction is entered and 90-day time period for filing petition for certiorari to Supreme Court has expired).

C. Byford v. State

On February 28, 2000, the Nevada Supreme Court decided *Byford v. State*, 116 Nev. 215, 994 P.2d 700 (2000). In *Byford*, the court disapproved of the *Kazalyn* instruction because it did not define premeditation and deliberation as separate elements of first-degree murder. *Id.* Its prior cases, including *Kazalyn*, had "underemphasized the element of deliberation." *Id.* Cases such as *Kazalyn* and *Powell v. State*, 108 Nev. 700, 708-10, 838 P.2d 921, 926-27 (1992), had reduced "premeditation" and "deliberation" to synonyms and that, because they were "redundant," no instruction separately defining deliberation was required. *Id.* It pointed out that, in *Greene v. State*, 113 Nev. 157, 168, 931 P.2d 54, 61 (1997), the court went so far as to state that "the terms premeditated, deliberate, and willful are a single phrase, meaning simply that the actor intended to commit the act and intended death as a result of the act."

The *Byford* court specifically "abandoned" this line of authority. *Byford*, 994 P.2d at 713. It held:

> By defining only premeditation and failing to provide deliberation with any independent definition, the *Kazalyn* instruction blurs the distinction between first- and second-degree murder. *Greene*'s further reduction of premeditation and deliberation to simply "intent" unacceptably carries this blurring to a complete erasure.

Id. The court emphasized that deliberation remains a "critical element of the *mens rea* necessary for first-degree murder, connoting a dispassionate weighting process and consideration of consequences before acting." *Id.* at 714. It is an element that "'must be proven beyond a reasonable doubt before an accused can be convicted or first degree murder.'" *Id.*at 713-14 (quoting *Hern v. State*, 97 Nev. 529, 532, 635 P.2d 278, 280 (1981)).

The court held that, "[b]ecause deliberation is a distinct element of *mens rea* for first-degree murder, we direct the district courts to cease instructing juries that a killing resulting from premeditation is "willful, deliberate, and premeditated murder." *Byford*, 994 P.2d at 714. The court directed the state district courts in the future to separately define deliberation in jury instructions and provided model instructions for the lower courts to use. *Id.* The court did not grant relief in *Byford*'s case because the evidence was "sufficient for the jurors to reasonably find that before acting to kill the victim Byford weighed the reasons for and against his action, considered its consequences, distinctly formed a design to kill, and did not act simply from a rash, unconsidered impulse." *Id.* at 712-13.

On August 23, 2000, the Nevada Supreme Court decided *Garner v. State*, 116 Nev. 770, 6 P.3d 1013, 1025 (2000). In *Garner*, the court held that the use of the *Kazalyn* instruction at trial was neither constitutional nor plain error. *Id.* at 1025. The Nevada Supreme Court rejected the argument that, under *Griffith v. Kentucky*, 479 U.S. 314 (1987), *Byford* had to apply retroactively to Garner's case as his conviction had not yet become final. *Id.* According to the court, *Griffith* only

concerned constitutional rules and *Byford* did not concern a constitutional error. *Id.* The jury instructions approved in *Byford* did not have any retroactive effect as they were "a new requirement with prospective force only." *Id.*

The Nevada Supreme Court explained that the decision in *Byford* was a clarification of the law as it existed prior to *Byford* because the case law prior to *Byford* was "divided on the issue":

> This does not mean, however, that the reasoning of *Byford* is unprecedented. Although *Byford* expressly abandons some recent decisions of this court, it also relies on the longstanding statutory language and other prior decisions of this court in doing so. Basically, *Byford interprets and clarifies* the meaning of a preexisting statute by resolving conflict in lines in prior case law. Therefore, its reasoning is not altogether new.
>
> Because the rationale in *Byford* is not new and could have been – and in many cases was – argued in the district courts before *Byford* was decided, it is fair to say that the failure to object at trial means that the issue is not preserved for appeal.

Id. at 1025 n.9 (emphasis added).

D. *Fiore v. White* and *Bunkley v. Florida*

In 2001, the United States Supreme Court decided *Fiore v. White*, 531 U.S. 225 (2001). In *Fiore*, the Supreme Court held that due process requires that a clarification of the law apply to all convictions, even a final conviction that has been affirmed on appeal, where the clarification reveals that a defendant was convicted "for conduct that [the State's] criminal statute, as properly interpreted, does not prohibit." *Id.* at 228.

In 2003, the United States Supreme Court decided *Bunkley v. Florida*, 538 U.S. 835 (2003). In *Bunkley*, the Court held that, as a matter of due process, a change in

state law that narrows the category of conduct that can be considered criminal, had to be applied to convictions that had yet to become final. *Id.* at 840-42.

E. First Post-Conviction Petition

The district court denied Ennis's first post-conviction petition on April 5, 2004. Ennis appealed to the Nevada Supreme Court. On November 3, 2004, the Nevada Supreme Court ruled in part:

> Second, Ennis claimed that his appellate counsel was ineffective for failing to argue that the jury instruction concerning premeditation and deliberation impermissibly removed the distinction between first and second-degree murder. In *Kazalyn v. State*, this court approved a jury instruction regarding premeditation that is almost identical to the one given by the district court in the instant case. Subsequent to the resolution of Ennis' direct appeal, however, this court expressly disapproved of the *Kazalyn* instruction and set forth an alternative jury instruction for future use. Nevertheless, a conviction in which the *Kazalyn* instruction was given is not automatically overturned. This court reviews the case to determine if sufficient evidence was adduced at trial to establish premeditation and deliberation. Here, multiple witnesses testified that Ennis borrowed David Nix's sawed-off shotgun and stated his intention to kill the victim. Therefore, sufficient evidence of premeditation and deliberation was presented at trial, such that an appeal of this issue did not have a reasonable likelihood of success. Consequently, Ennis did not establish that his appellate counsel was ineffective in this regard, and this district court did not err in denying him relief on this claim.

(Order of Affirmance, p. 4-5.) (Footnotes omitted.) The court affirmed the district court's denial of relief.

F. *Nika v. State*

In 2007, the Ninth Circuit decided *Polk v. Sandoval*, 503 F.3d 903 (9th Cir. 2007). In *Polk*, that court concluded that the *Kazalyn* instruction violated due process

under *In Re* Winship, 397 U.S. 358 (1970), because it relieved the State of its burden of proof as to the element of deliberation. *Polk*, 503 F.3d at 910-12.

In response to *Polk*, the Nevada Supreme Court in 2008 issued *Nika v. State*, 124 Nev. 1272, 198 P.3d 839, 849 (Nev. 2008). In *Nika*, the Nevada Supreme Court disagreed with *Polk*'s conclusion that a *Winship* violation occurred. The court stated that, rather than implicate *Winship* concerns, the only due process issue was the retroactivity of *Byford*. It reasoned that it was within the court's power to determine whether *Byford* represented a clarification of the interpretation of a statute, which would apply to everybody, or a change in the interpretation of a statute, which would only apply to those convictions that had yet to become final. *Id.* at 849-50. The court held that *Byford* represented a change in the law as to the interpretation of the first-degree murder statute. *Id.* at 849-50. The court specifically "disavow[ed]" any language in *Garner* indicating that *Byford* was anything other than a change in the law, stating that language in *Garner* indicating that *Byford* was a clarification was dicta. *Id.* at 849-50.

The court acknowledged that because *Byford* had changed the meaning of the first-degree murder statute by narrowing its scope, due process required that *Byford* had to be applied to those convictions that had not yet become final at the time it was decided, citing *Bunkley* and *Fiore*. *Id.* at 850, 850 n.7, 859. In this regard, the court also overruled *Garner* to the extent that it had held that *Byford* relief could only be prospective. *Id.* at 859.

The court emphasized that *Byford* was a matter of statutory interpretation and not a matter of constitutional law. *Id.* at 850. That decision was solely addressing what the court considered to be a state law issue, namely "the interpretation and definition of the elements of a state criminal statute." *Id.*

G. *Montgomery v. Louisiana* and *Welch v. United States*

On January 25, 2016, the United States Supreme Court decided *Montgomery v. Louisiana*, 136 S. Ct. 718 (2016). In *Montgomery*, the Court addressed the question of whether *Miller v. Alabama*, 132 S. Ct. 2455 (2012), which prohibited under the Eighth Amendment mandatory life sentences for juvenile offenders, applied retroactively to cases that had already become final by the time of *Miller*. *Montgomery*, 136 S. Ct. at 725.

To answer this question, the Court applied the retroactivity rules set forth in *Teague v. Lane*, 489 U.S. 288 (1989). Under *Teague*, a new constitutional rule of criminal procedure does not apply, as a general matter, to convictions that were final when the rule was announced. *Montgomery*, 136 S. Ct. at 728. However, *Teague* recognized two categories of rules that are not subject to its general retroactivity bar. *Id.* First, courts must give retroactive effect to new substantive rules of constitutional law. *Id.* Substantive rules include "rules forbidding criminal punishment of certain primary conduct, as well as rules prohibiting a certain category of punishment for a class of defendants because of their status or offense." *Id.* (internal quotations omitted). Second, courts must give retroactive effect to new "watershed rules of criminal procedure implicating the fundamental fairness and accuracy of the criminal proceeding." *Id.* (internal quotations omitted).

The primary question the Court addressed in *Montgomery* was whether it had jurisdiction to review the question. The Court stated that it did, holding "when a new substantive rule of constitutional law controls the outcome of a case, the Constitution requires state collateral review courts to give retroactive effect to that rule." *Montgomery*, 136 S. Ct. at 729. "*Teague*'s conclusion establishing the retroactivity of new substantive rules is best understood as resting upon constitutional premises." *Id.* "States may not disregard a controlling constitutional command in their own

courts." *Id.* at 727 (citing *Martin v. Hunter's Lessess*, 1 Wheat. 304, 340-41, 344 (1816)).

The Court concluded that *Miller* was a new substantive rule; the states, therefore, had to apply it retroactively on collateral review. *Montgomery*, 136 S. Ct. at 732.

On April 18, 2016, the United States Supreme Court decided *Welch v. United States*, 136 S. Ct. 1257 (2016). In *Welch*, the Court addressed the question of whether *Johnson v. United States*, which held that the residual clause in the Armed Career Criminal Act was void for vagueness under the Due Process Clause, applied retroactively to convictions that had already become final at the time of *Johnson*. *Welch*, 136 S. Ct. at 1260-61, 1264. More specifically, the Court determined whether *Johnson* represented a new substantive rule. *Id.* at 1264-65. The Court defined a substantive rule as one that "'alters the range of conduct or the class of persons that the law punishes.'" *Id.* (quoting *Schiro v. Summerlin*, 542 U.S. 348, 353 (2004)). "'*This includes decisions that narrow the scope of a criminal statute by interpreting its terms*, as well as constitutional determinations that place particular conduct or persons covered by the statute beyond the State's power to punish.'" *Id.* at 1265 (quoting *Schiro*, 542 U.S. at 351-52) (emphasis added). Under that framework, the Court concluded that *Johnson* was substantive. *Id.*

The Court then turned to the *amicus* arguments, which asked the court to adopt a different framework for the *Teague* analysis. *Welch*, 136 S. Ct. at 1265. Among the arguments that *amicus* advanced was that a rule is only substantive when it limits Congress's power to act. *Id.* at 1267.

The Court rejected this argument, pointing out that some of the Court's "substantive decisions do not impose such restrictions." *Id.* The "clearest example" was *Bousley v. United States*, 523 U.S. 614 (1998). *Id.* The question in *Bousley* was

whether *Bailey v. United States*, 516 U.S. 137 (1995), was retroactive. *Id.* In *Bailey*, the Court had "held as a matter of statutory interpretation that the 'use' prong [of 18 U.S.C. § 924(c)(1)] punishes only 'active employment of the firearm' and not mere possession." *Welch*, 136 S. Ct. at 1267 (quoting *Bailey*). The Court in *Bousley* had "no difficulty concluding that *Bailey* was substantive, as it was a decision 'holding that a substantive federal criminal statute does not reach certain conduct.'" *Id.* (quoting *Bousley*). The Court also cited *Schriro*, 542 U.S. at 354, using the following parenthetical as further support: "A decision that modifies the elements of an offense is normally substantive rather than procedural." The Court pointed out that *Bousley* did not fit under the *amicus*'s *Teague* framework as Congress amended § 924(c)(1) in response to *Bailey*. *Welch*, 136 S. Ct. at 1267.

Recognizing that *Bousley* did not fit, *amicus* argued that *Bousley* was simply an exception to the proposed framework because, according to *amicus*, "*Bousley* 'recognized a separate subcategory of substantive rules for decisions that interpret statutes (but not those, like *Johnson*, that invalidate statutes).'" *Welch*, 136 S. Ct. at 1267 (quoting *Amicus* brief). *Amicus* argued that statutory construction cases are substantive because they define what Congress always intended the law to mean. *Id.*

The Court rejected this argument. It stated that statutory interpretation cases are substantive solely because they meet the criteria for a substantive rule:

> Neither *Bousley* nor any other case from this Court treats statutory interpretation cases as a special class of decisions that are substantive because they implement the intent of Congress. Instead, decisions that interpret a statute are substantive if and when they meet the normal criteria for a substantive rule: when they "alte[r] the range of conduct or the class of persons that the law punishes."

Welch, 136 S. Ct. at 1267 (emphasis added).

II. ANALYSIS

A. *Welch* And *Montgomery* Establish That The Narrowing Interpretation Of The First-Degree Murder Statute In *Byford* Must Be Applied Retroactively in State Court To Convictions That Were Final At The Time *Byford* Was Decided.

In *Montgomery*, the United States Supreme Court, for the first time, constitutionalized the "substantive rule" exception to the *Teague* retroactivity rules. The consequence of this step is that state courts are now required to apply the "substantive rule" exception in the manner in which the United States Supreme Court applies it. *See Montgomery*, 136 U.S. at 727 ("States may not disregard a controlling constitutional command in their own courts.").

In *Welch*, the Supreme Court made clear that the "substantive rule" exception includes "*decisions that narrow the scope of a criminal statute by interpreting its terms*." What is critically important, and new, about *Welch* is that it explains, for the very first time, that the *only* test for determining whether a decision that interprets the meaning of a statute is substantive, and must apply retroactively to all cases, is whether the new interpretation meets the criteria for a substantive rule, namely whether it alters the range of conduct or the class of persons that the law punishes. Because this aspect of *Teague* is now a matter of constitutional law, state courts are required to apply this rule from *Welch*.

This new rule from *Welch* has a direct and immediate impact on the retroactive effect of *Byford*. In *Nika*, the Nevada Supreme Court concluded that *Byford* was substantive. The court held specifically that *Byford* represented an interpretation of a criminal statute that narrowed its meaning. This was correct as *Byford*'s interpretation of the first-degree murder statute, in which the court stated that a jury is required to separately find the element of deliberation, narrowed the range of individuals who could be convicted of first-degree murder.

Nevertheless, the court concluded that, because *Byford* was a change in law, as opposed to a clarification, it did not need to apply retroactively to convictions that had already become final, like Ennis's. In light of *Welch*, this distinction between a "change" and "clarification" no longer matters. The *only* relevant question is whether the new interpretation represents a new substantive rule. In fact, a "change in law" fits far more clearly under the *Teague* substantive rule framework than a clarification because it is a "new" rule. The Supreme Court has suggested as much previously. *See Gonzalez v. Crosby*, 545 U.S. 524, 536 n.9 (2005) ("A *change* in the interpretation of a *substantive* statute may have consequences for cases that have already reached final judgment, particularly in the criminal context." (emphasis added); citing *Bousley v. United States*, 523 U.S. 614 (1998); and *Fiore*).[2] Critically, in *Welch*, the Supreme Court never used the word "clarification" once when it analyzed how the statutory interpretation decisions fit under *Teague*. Rather, it only used the term "interpretation" without qualification. The analysis in *Welch* shows that the Nevada Supreme Court's distinction between "change" and "clarification" is no longer a relevant factor in determining the retroactive effect of a decision that interprets a criminal statute by narrowing its meaning.

Accordingly, under *Welch* and *Montgomery*, petitioner is entitled to the benefit of having *Byford* apply retroactively to his case. The *Kazalyn* instruction defining premeditation and deliberation, which this court has already determined was given in his case, was improper.

It is reasonably likely that the jury applied the challenged instruction in a way that violates the Constitution. *See Middleton v. McNeil*, 541 U.S. 433, 437 (2004). As the Nevada Supreme Court explained in *Byford*, the instruction blurred the

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[2] In contrast, the United States Supreme Court has never cited *Bunkley* in any subsequent case.

distinction between first and second degree murder. It reduced premeditation and deliberation down to intent to kill. The State was relieved of its obligation to prove essential elements of the crime. In turn, the jury was not required to find deliberation. The jury was never required to find whether there was "coolness and reflection" as required under Byford. *Byford*, 994 P.2d at 714. The jury was never required to find whether the murder was the result of a "process of determining upon a course of action to kill as a result of thought, including weighing the reasons for and against the action and considering the consequences of the action." *Id.*

This error had a prejudicial impact on this case. The evidence against Ennis was not so great that it precluded a verdict of second-degree murder. The State argued three different reasons Ennis may have wanted to kill his stepfather: 1) Ennis was angry over the death of his brother, for which he blamed his stepfather; 2) Ennis was angry about his motorcycle; and 3) Ennis needed money. (Trial Transcript ("TT") 12/4/95, p. 1059-1062.) All of theories, however, were problematic. First, Ennis's brother had committed suicide thirteen (13) years prior and there was no evidence that Ennis had this event in mind at the time of the killing. Second, while one witness testified that Ennis had threatened to kill his stepfather if he (stepfather) did not give Ennis back the title to his motorcycle, Ennis had gotten the title to his bike back several days before the incident. (TT 11/30/95, p. 547.) And third, the jury acquitted Ennis of robbery. (Verdict, 11/4/95.)

The State presented a series of witnesses who testified that on the date in question, shortly before the shooting, Ennis went to a friend's house to borrow a shotgun and stated that he was going to kill his stepfather. However, the credibility of all the witnesses was questionable. The first witness, Deborah Wheeler, did not tell the police this troubling information when she first spoke with them on the night of the shooting. Rather, she waited nine months before coming forward with this

information. She had two prior convictions for dealing methamphetamine, was arrested again for drugs two months before her second statement to the police, and was arrested for a fourth time while this case was still pending. If convicted for drug dealing a third time, she would not be able to avoid prison. Wheeler falsely claimed that she was not getting any benefit from her testimony at Ennis's trial. (TT 11/30/95, p. 307-405.) However, Deputy District Attorney William Kephart testified that he offered Wheeler a deal to plead to a lesser offense, which carried the possibility of probation, and that the negotiations were dependent on her testimony in this case. (TT 12/1/95, p. 875-894.)

The next witness, David Nix, also lied to the police when he gave his initial statement on the night of the shooting. He also lied in his second and third statements to the police in the days following the shooting. He lied again when he testified under oath at Ennis's preliminary hearing. The first time he told the police that Ennis got the shotgun from him on the day of the shooting and said he was going to kill his stepfather was in June of 1993. (TT 11/30/95, p. 441-514.) This was the same date that all of the State's witnesses, who were all friends, suddenly gave a new and identical version of events. Wheeler also began living with Nix sometime after the shooting.

Another State witness, Tanya Leahy, Nix's girlfriend, similarly waited until nine months after the shooting to admit that she lied in her initial statement to the police. In June of 1993 she suddenly told police that she gave Nix's shotgun to Ennis on the date in question and Ennis said he was going to shoot his stepfather. (TT 12/1/95, p. 635-690.)

There was significant evidence presented at trial weighing in favor of second-degree murder. Ennis testified on his own behalf that he and his stepfather argued frequently because his stepfather did not want him, Ennis, to keep riding his

motorcycle. Ennis had been in two, serious accidents earlier that same year and had become addicted to pain medications. Ennis testified that on the date in question, he was fixing his bike in Harry (Hank) Vaughan's garage when he once again got into an argument with his stepfather about it. Vaughan had to step in between the two of them and told Ennis to leave. Ennis came back shortly after to retrieve his bike and the argument picked up where it left off with his stepfather. Ennis testified that his stepfather, who had a temper, pulled out a switchblade knife and charged at Ennis with it. Ennis, who had limited mobility due to his previous injuries, grabbed the shotgun to defend himself and fired it once in his stepfather's direction. Ennis was stunned to discover that he had shot and killed his stepfather. He grabbed the knife and the shotgun and fled in the victim's car. (TT 12/4/95, p. 910-1037.)

Much of Ennis's testimony was corroborated by other witnesses. Betty Forisha, Ennis's mother and wife of the victim, testified that the victim did own a switchblade. (TT 11/30/95, p. 532-572a.) Officer Al Woodruff, who had contact with Ennis shortly after the shooting, recovered the switchblade from the vehicle and confirmed that Ennis said the knife was his father's. (TT 12/1/95, p. 780-791.) A hitchhiker that Ennis picked up, Janet Page, also saw Officer Woodruff recover the switchblade. (TT 11/29/05, p. 242-304.)

Several witnesses who had contact with Ennis shortly after the shooting heard him say that his stepfather pulled a knife on him and that Ennis shot his stepfather in self-defense, including Page (TT 11/29/05, p. 242-304); Leahy (TT 12/1/95, p. 635-690); and Melissa Sisney, Ennis's sister (TT 12/1/95, p. 842-874). Numerous other witnesses confirmed that Ennis and the victim both had tempers, and that the victim could be violent when angry: Vaughan saw Ennis and the victim arguing and described the veins bulging in the victim's neck because he was so angry (TT 11/29/95, 165-241); Nix testified that Ennis and his stepfather often argued (TT 11/30/95, p.

441-514); Forisha testified that the victim had a drinking problem and could be violent whether he was drinking or not, would "go after" someone who made him angry, and was already agitated when he left home on the day of the shooting (TT 11/30/95, p. 532-572a; 12/1/95, p. 572-590); and Sisney said that both Ennis and the victim had tempers, but the victim started a lot of the arguments, had a drinking problem, and could be mean (TT 12/1/95, p. 842-874).

The evidence was such that even if the jury did not believe what occurred met the statutory definition of self-defense, there was evidence that the shooting happened in the heat of the moment during an argument between Ennis and his stepfather. However, the prosecutor's closing argument exacerbated the harm from the improper jury instruction when he told the jury that the pertinent factor for them to consider was premeditation, which he described as a determination to kill that could be "formed in the mind at any moment before the killing." (TT 12/4/95, p. 1069.) He also argued that if premeditation was proven, "then the time which passes may be as instantaneous as successive thoughts of the mind, as long as an individual has determined to kill before he does kill." *Id.* The prosecutor made no mention of deliberation as a separate and distinct element of the crime. There can be no doubt that the jury applied the *Kazalyn* instruction in an unconstitutional manner and that the error prejudiced Ennis.

B. Petitioner Has Good Cause to Raise this Claim in a Second or Successive Petition.

To overcome the procedural bars of NRS 34.726 and NRS 34.810, a petitioner has the burden to show "good cause" for delay in bringing his claim or for presenting the same claims again. *See Pellegrini v. State*, 117 Nev. 860, 887, 34 P.2d 519, 537 (2001). One manner in which a petitioner can establish good cause is to show that the legal basis for the claim was not reasonably available at the time of the default.

Id. A claim based on newly available legal basis must rest on a previously unavailable constitutional claim. *Clem v. State*, 119 Nev. 615, 621, 81 P.3d 521, 525-26 (2003). A petitioner has one-year to file a petition from the date that the claim has become available. *Rippo v. State*, 132 Nev. Adv. Op. 11, 368 P.3d 729, 739-40 (2016), *rev'd on other grounds*, *Rippo v. Baker*, 2017 WL 855913 (Mar. 6, 2017).

The decisions in *Montgomery* and *Welch* provide good cause for overcoming the procedural bars. *Montgomery* established a new rule of constitutional law, namely that the "substantive rule" exception to the *Teague* rule applies in state courts as a matter of due process. Furthermore, *Welch* clarified that this constitutional rule includes the Supreme Court's prior statutory interpretation decisions. Moreover, *Welch* established that the only requirement for an interpretation of a statute to apply retroactively under the "substantive rule" exception to *Teague* is whether the interpretation narrowed the class of individuals who could be convicted under the statute. These rules were not previously available to petitioner. Finally, petitioner submitted this petition within one year of *Welch*, which was decided on April 18, 2016.

Alternatively, petitioner can overcome the procedural bars based upon a fundamental miscarriage of justice. A fundamental miscarriage of justice occurs when a court fails to review a constitutional claim of a petitioner who can demonstrate that he is actually innocent. *See Bousley v. United States*, 523 U.S. 614, 623 (1998). Actual innocence is shown when "in light of all evidence, it is more likely than not that no reasonable juror would have convicted him." *Schlup v. Delo*, 513 U.S. 298, 327-328 (1995). One way a petitioner can demonstrate actual innocence is to show in light of subsequent case law that narrows the definition of a crime, he could not have been convicted of the crime. *See Bousley*, 523 U.S. at 620, 623-24; *Mitchell v. State*, 122 Nev. 1269, 1276-77, 149 P.3d 33, 37-38 (2006).

As discussed before, the Nevada Supreme Court has previously indicated that *Byford* represented a narrowing of the definition of first-degree murder. Under *Welch* and *Montgomery*, that decision is substantive. In other words, there is a significant risk that petitioner stands convicted of an act that the law does not make criminal. For the reasons discussed before, the facts in this case established that petitioner only committed a second-degree murder. As such, in light of the entire evidentiary record in this case, it is more likely than not no reasonable juror would convict him of first-degree murder.

Law of the case also does not bar this Court from addressing this claim due to the intervening change in law. Under the law of the case doctrine, "the law or ruling of a first appeal must be followed in all subsequent proceedings." *Hsu v. County of Clark*, 123 Nev. 625, 173 P.3d 724, 728 (2007). However, the Nevada Supreme Court has recognized that equitable considerations justify a departure from this doctrine. *Id.* at 726. That court has noted three exceptions to the doctrine: (1) subsequent proceedings produce substantially new or different evidence; (2) there has been an intervening change in controlling law; or (3) the prior decision was clearly erroneous and would result in manifest injustice if enforced. *Id.* at 729.

Here, *Welch* and *Montgomery* represent an intervening change in controlling law. These cases establish new rules that control the control both the state courts as well as the outcome here. Thus, law of the case does not bar consideration of the issue here.

Finally, petitioner can establish actual prejudice for the reasons discussed on pages 20 to 24. It is reasonably likely that the jury applied the challenged instruction in a way that violates the Constitution. The State was relieved of its obligation to prove essential elements of the crime. In turn, the jury was not required to find the element of deliberation. This error had a prejudicial impact on this case. The

evidence against Ennis was not so great that it precluded a verdict of second-degree murder. Further, the prosecutor's comments in closing arguments exacerbated the harm from the improper instruction.

III. PRAYER FOR RELIEF

Based on the grounds presented in this petition, Petitioner, Bruce Ennis, respectfully requests that this honorable Court:

1. Issue a writ of habeas corpus to have Mr. Ennis brought before the Court so that he may be discharged from his unconstitutional confinement and sentence;

2. Conduct an evidentiary hearing at which proof may be offered concerning the allegations in this Petition and any defenses that may be raised by Respondents and;

3. Grant such other and further relief as, in the interests of justice, may be appropriate.

WHEREFORE, Petitioner prays that the court grant Petitioner relief to which he may be entitled in this proceeding.

DATED this 13th day of April, 2017.

Respectfully submitted,
RENE L. VALLADARES
Federal Public Defender

/s/ CB Kirschner
C.B. KIRSCHNER
Assistant Federal Public Defender

VERIFICATION

Under penalty of perjury, the undersigned declares that she is counsel for the petitioner named in the foregoing petition and knows the contents thereof; that the pleading is true of her own knowledge except as to those matters stated on information and belief and as to such matters she believes them to be true. Petitioner personally authorized undersigned counsel to commence this action.

DATED this 13th day of April, 2017.

/s/ CB Kirschner
C.B. KIRSCHNER
Assistant Federal Public Defender

CERTIFICATE OF SERVICE

The undersigned hereby certifies that she is an employee in the office of the Federal Public Defender for the District of Nevada and is a person of such age and discretion as to be competent to serve papers.

That on April 13, 2017, she served a true and accurate copy of the foregoing PETITION FOR WRIT OF HABEAS CORPUS by placing it in the United States mail, first-class postage paid, addressed to:

Steve Wolfson
Clark County District Attorney
301 E. Clark Ave #100
Las Vegas, NV 89101

Attorney General Adam P. Laxalt
Office of the Attorney General
555 E. Washington Ave #3900
Las Vegas, NV 89101

Bruce Ennis
No. 48952
Ely State Prison
P.O Box 1989
Ely, NV 89301

/s/ Jessica Pillsbury
An Employee of the
Federal Public Defender
District of Nevada

IN THE SUPREME COURT OF THE STATE OF NEVADA

BRUCE MAYO ENNIS,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 28322

FILED

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JANETTE M. BLOOM
CLERK OF SUPREME COURT
BY
CHIEF DEPUTY CLERK

ORDER DISMISSING APPEAL

This is an appeal from a judgment of conviction entered pursuant to a jury verdict of murder with the use of a deadly weapon.

On the evening of September 24, 1992, Bruce Mayo Ennis experienced mechanical problems with his motorcycle and took it to a garage owned by his friend, Harry Vaughan. Ennis worked on the motorcycle for some time, but, unable to repair it, decided to leave it in Vaughan's garage for the night.

Ennis returned to the garage the following morning. Ennis' stepfather, Lynn Forisha, arrived shortly thereafter to work on a Dodge Daytona that Forisha had been storing at the garage. Upon seeing each other, Forisha and Ennis began to argue and yell at each other. Vaughan overheard the dispute and intervened, telling Ennis to leave the premises. Ennis left the garage and went to a local bar. Later that day, Ennis returned to Vaughan's garage and shot Forisha in the chest, killing him. After shooting Forisha, Ennis left the garage in Forisha's MG sports car and picked up a hitchhiker, Janet Page. Ennis and Page drove to Ennis' mother's house in Boulder City, where they took guns and jewelry belonging to Forisha before driving back to Las Vegas, where Ennis was arrested for Forisha's murder.

Ennis was charged with one count each of murder with the use of a deadly weapon, robbery with the use of deadly weapon, and possession of a firearm by an ex-felon. The

district court severed the murder and robbery charges from the possession of a firearm charge. At trial, Ennis testified that he acted in self-defense. Several of Forisha and Ennis' acquaintances, including Vaughan, Deborah Wheeler, and David Nix, testified on behalf of the State that Ennis intended to kill Forisha.

The jury found Ennis guilty of murder with the use of a deadly weapon. Ennis argues on appeal that insufficient evidence exists to support this verdict.

The standard of review for sufficiency of the evidence upon appeal is whether a rational trier of fact, after viewing the evidence in a light most favorable to the prosecution, could have been convinced of the defendant's guilt beyond a reasonable doubt. Kazalyn v. State, 108 Nev. 67, 71, 825 P.2d 578, 581 (1992); McNair v. State, 108 Nev. 53, 56, 825 P.2d 571, 573 (1992) (citing Jackson v. Virginia, 443 U.S. 307, 319 (1979)). The jury's verdict will not be disturbed where substantial evidence exists to support it. Kazalyn, 108 Nev. at 71, 825 P.2d at 581. "It is exclusively within the province of the trier of fact to weigh evidence and pass on the credibility of witnesses and their testimony." Lay v. State, 110 Nev. 1189, 1192, 886 P.2d 448, 450 (1994).

Ennis argues that several of the State's witnesses fabricated their testimony, thereby suggesting that the jury's verdict was not based on credible or reliable evidence. Ennis contends that (1) several witnesses who testified on behalf of the State did not dispute Ennis' claim of self-defense until nine months after the shooting, (2) Nix's trial testimony contradicted earlier statements made to the police, (3) Wheeler and Vaughan falsely denied that they received reduced charges in unrelated drug offenses in exchange for their testimony, and (4) Page's testimony was unsupported by any evidence.

This case rested on the credibility of each of the witnesses, including Ennis. Despite the credibility issues raised by Ennis, the jurors chose to accept as true the testimony of the State's witnesses. We conclude that Ennis is inappropriately asking this court to reassess the weight of the evidence and pass on the credibility of the witnesses. See Lay, 110 Nev. at 1192, 886 P.2d at 450. Furthermore, we have reviewed the record in this case and conclude that substantial evidence exists to support the conviction of murder with the use of a deadly weapon. Accordingly, we

ORDER this appeal dismissed.

Shearing, C.J.

Springer, J.

Rose, J.

Young, J.

Maupin, J.

cc: Hon. Jeffrey D. Sobel, District Judge
Hon. Frankie Sue Del Papa, Attorney General
Laura Melia
Stewart L. Bell, District Attorney, Clark County
Loretta Bowman, Clerk

APP. 103

IN THE SUPREME COURT OF THE STATE OF NEVADA

CLERK'S CERTIFICATE

STATE OF NEVADA, ss.

I, Janette M. Bloom, the duly appointed and qualified Clerk of the Supreme Court of said State of Nevada, do hereby certify that the following is a full, true and correct copy of the Judgment in the matter of BRUCE MAYO ENNIS V. THE STATE OF NEVADA, Case No. 28322.

JUDGMENT

The Court being fully advised in the premises and the law, it is now ordered, adjudged and decreed, to the effect: "ORDER this appeal dismissed."

Judgment, as quoted above, entered this 30th day of December, 19 97.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the Seal of said Supreme Court, at my office in Carson City, Nevada, this 21st day of January, 19 98.

mb

JANETTE M. BLOOM
Clerk of Supreme Court of the State of Nevada

By J. Richards
Chief Deputy Clerk

(Rev. 9-92)

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ORIGINAL

JOC
STEWART L. BELL
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200 S. Third Street
Las Vegas, Nevada 89155
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Attorney for Plaintiff

FILED

JAN 30 9 02 AM '96

CLERK

DISTRICT COURT
CLARK COUNTY, NEVADA

THE STATE OF NEVADA,

Plaintiff,

-vs-

BRUCE MAYO ENNIS,
#0280037

Defendant.

Case No. C110002
Dept. No. V
Docket H

JUDGMENT OF CONVICTION (JURY TRIAL)

WHEREAS, on the 22nd day of December, 1992, the Defendant BRUCE MAYO ENNIS, entered a plea of not guilty to the crimes of COUNT I - MURDER WITH USE OF A DEADLY WEAPON (Felony); COUNT II - ROBBERY WITH USE OF A DEADLY WEAPON (Felony); and COUNT III - POSSESSION OF FIREARM BY EX-FELON (Felony), committed on the 25th day of September, 1992, in violation of NRS 200.010, 200.030, 193.330, 200.380, 193.330, 202.360, and the matter having been tried before a jury, and the Defendant being represented by counsel and having been found guilty of the crime of COUNT I - MURDER OF THE FIRST DEGREE WITH USE OF A DEADLY WEAPON (Felony); and

WHEREAS, on the 18th day of January, 1996, the Defendant BRUCE MAYO ENNIS, appeared before the Court herein with his counsel and entered a plea of guilty to the crime of COUNT III - POSSESSION OF FIREARM BY EX-FELON (Felony), committed on the 25th day of September, 1992, in violation of NRS 202.360 and

WHEREAS, thereafter, on the 18th day of January, 1996, the Defendant being present in Court

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with his counsel LAURA MELIA, ESQ., and TED MANOS, ESQ., and MELVYN T. HARMON, Chief Deputy District Attorney also being present; the above entitled Court did adjudge Defendant guilty thereof by reason of said trial and verdict and, in addition to the $25.00 Administrative Assessment Fee, sentenced Defendant to COUNT I - LIFE WITHOUT THE POSSIBILITY OF PAROLE in the Nevada State Prison for MURDER OF THE FIRST DEGREE plus a consecutive LIFE WITHOUT THE POSSIBILITY OF PAROLE in the Nevada State Prison for USE OF A DEADLY WEAPON and to COUNT III - SIX (6) years in the Nevada State Prison for POSSESSION OF FIREARM BY EX-FELON to run concurrent with Count I. Credit for time served 1,209 days.

THEREFORE, the Clerk of the above entitled Court is hereby directed to enter this Judgment of Conviction as part of the record in the above entitled matter.

DATED this 25th day of January, 1996, in the City of Las Vegas, County of Clark, State of Nevada.

DISTRICT JUDGE

DA#92-110002X/kjh
LVMPD DR#9209251119
1° MURDER W/WPN;POSS F/A BY EX-FELON - F
(TK4)

INSTRUCTION NO. 8

Premeditation is a design, a determination to kill, distinctly formed in the mind at any moment before or at the time of the killing.

Premeditation need not be for a day, an hour or even a minute. It may be as instantaneous as successive thoughts of the mind. For if the jury believes from the evidence that the act constituting the killing has been preceded by and has been the result of premeditation, no matter how rapidly the premeditation is followed by the act constituting the killing, it is willful, deliberate and premeditated murder.